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LAW JOURNAL INDEX

The editors of the LAW JOURNAL plan the publication next year of a comprehensive index to Volumes 1 through 20 of the JOURNAL. This index, most of which has already been compiled by members of the JOURNAL staff, will include a table of all cases commented on in the JOURNAL. Publication of the index has been approved by the University, and it is contemplated that the index will be ready for distribution in the early part of 1950.

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I

CONTRACTS AND COMMERCIAL LAW

*Vardaman S. Dunn**

Consideration

It is not always necessary that a promise shall have the support of what in ordinary cases is meant by a consideration. On the contrary, our court adopts the rule as found in the *Restatement of Contracts*[1] that: "A promise which the promissor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of promissee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise."[2]

Performance

The common-law rule required literal performance of building contracts, but our court, along with most others in this country, holds that substantial performance of such contracts will support a recovery either on the contract or on a quantum meruit basis.

The court followed the general rule in *Standard Millwork and Supply Company v. Mississippi Steel and Iron Company*[3] and defined substantial performance as that existing where the building or structure as a whole is not impaired and can be used for its intended purpose and where the defects can be remedied without any great expenditure or material damage to other parts of the structure, and may without injustice be compensated for by deductions from the contract price. If these requirements are met and the contractor has acted in good faith and has not intentionally failed

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*Member of the firm of Lotterhos, Travis and Dunn, Jackson, Mississippi.

[1]Section 90.

[2]Owen v. Sumrall, 204 Miss. 15, 36 So. 2d 800 (1948); Planters Lumber Co. v. Trinity Universal Insurance Co., 191 Miss. 875, 4 So. 2d 300 (1941).

[3]205 Miss. 96, 38 So. 2d 448 (1949); Y. D. Lumber Co. v. Aycock, 40 So. 2d 551 (Miss. 1949).

to perform the contract, recovery will not be denied as for a breach of contract.

The above mentioned case also dealt with the effect of a refusal by the owner's architect to approve the work as complete according to the contract requirements and held that such refusal would not defeat recovery if substantial performance appeared. Likewise, a refusal of the contractor to arbitrate as provided for in the contract will not defeat recovery under such circumstances.

The rules governing the so-called cost-plus contract, which became so prevalent during the war period, were announced in *Shaw v. Bula Cannon Shops.*[4] This type of building contract usually provides that the contractor will be paid the cost plus a fixed fee or percentage of cost. The contractor must keep accurate records of materials and labor in sufficient detail to enable the owner to check the same; he must use the same skill and ability as in other contracts; and he must show that expenditures, when questioned, were necessary, failing in which last mentioned requirement only the "reasonable cost and his percentage" may be recovered.

Validity and Avoidance

Fiduciaries

A presumption of fraud and invalidity of contracts may arise in proper cases from the relationship of the parties to the contract. Where the relationship involves trust and confidence, as between partners, the presumption arises but in *Ross v. Biggs*[5] the relation of partners was distinguished from that of stockholders in a commercial family corporation. Also, it was held that no such presumption arises merely from blood relationship accompanied by affection.

Motive

Motive for the execution of contracts is often injected in cases involving issues of fraud and bad faith, but motive alone cannot be used to avoid the transaction. Thus, in *Ross v. Biggs,*[6] the court held that persons of sound mind, except minors and those overreached, may act from any sort of motive satisfactory to themselves, whether it be love, affection, gratitude, partiality, prejudice, or even whim or caprice. The court declined in this case to set aside the sale and transfer of corporate stock from father to son on the ground that the motives which prompted the transfer were improper.

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[4] 205 Miss. 458, 38 So. 2d 916 (1949).
[5] 40 So. 2d 293 (Miss. 1949).
[6] 40 So. 2d 293 (Miss. 1949).

Failure to Read

While it is well settled that a person may not avoid a written contract merely because he did not read it or have it read to him and supposed its terms to be different, yet, as held in *J. J. Newman Lumber Company v. Robbins,*[7] when one party relies on the other to draw the instrument according to the terms of the agreement and the other party or his agent or the scrivener selected by him either through mistake or fraud fails to do so, the failure to read the instrument before signing is not such negligence as to prevent reformation. However, the rule closely approaches an intrusion on the parol evidence rule, and the court requires proof beyond a reasonable doubt.

Mistake

Generally, to justify reformation or cancellation of a contract for mistake alone, the mistake must have been mutual, and as to this the evidence must be clear and convincing.[8] But in rare instances relief may be granted for a unilateral mistake. The requirements are that the mistake must not result from negligence, as where the mistaken party could, by reasonable diligence, ascertain the facts or where the means of information are open to both parties and no confidence is reposed, and that no prejudice will result to the other party to the bargain. Because these requirements were not met, the court, in *Terre Haute Cooperage Inc. v. Branscome,*[9] denied relief by way of cancellation for a mistake of the seller in estimating a quantity of timber involved in a timber deed. In this case, the buyer said and did nothing to induce the error and the seller was found to have been negligent.

A mistake of law is generally not a ground for relief, yet if the mistake is induced or accompanied by other special features giving rise to an independent equity on behalf of the mistaken party, such as inequitable conduct, equity will interpose its aid. This rule was applied in *Peeler v. Hudson,*[10] where a party owning an interest in land assisted in making a sale as of the entire ownership between other co-tenants and the purchaser and failed to disclose his claim. An equitable estoppel was applied under the circumstances although the mistake as to ownership was one of law.

The above discussion concerns private contracts. A different rule seems to apply to public officials when dealing with public property. In *Koonce v. Board of Supervisors of Grenada County,*[11] the board sold

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[7]203 Miss. 304, 34 So. 2d 196 (1948).
[8]203 Miss. 15, 33 So. 2d 289 (1948).
[9]203 Miss. 493, 35 So. 2d 537 (1948).
[10]202 Miss. 837, 32 So. 2d 785 (1947).
[11]202 Miss. 473, 32 So. 2d 264 (1947).

timber on sixteenth section land for a price found to be grossly inadequate. This resulted from the board's mistake as to timber values. No fraud was involved. The court declined to uphold the transaction, saying: "Private individuals who negligently fail to ascertain the value of their own property may, in the absence of fraud, bind themselves by conveyances thereof for a grossly inadequate price, but this is not true of public officials . . . where the price is so grossly inadequate as to virtually amount to a donation, in violation of our State Constitution."

Usury

Usury is, of course, defined and the penalties prescribed by statute in this state, but a loan contract is governed by the laws of the state where the transaction is consummated and the laws of that state will determine the question of usury. Thus, in *Abraham v. Friendly Finance Company of Biloxi, Inc.*,[12] the laws of Louisiana were applied and it was found that the contract, while objectionable under the laws of this state, was not tainted with usury under the laws of Louisiana. The case involved a loan handled for a Mississippi resident through a Mississippi brokerage corporation on a deed of trust covering land in this state. It was found that the brokerage concern was a separate entity from the lending firm.

A question of usury arose out of a transaction for the sale of an automobile on credit. In *Yeager v. Ainsworth*[13] the court said there was no usury in such a sale when there is one price for cash and another for credit, provided the buyer understands that the prices are different and there is no bad faith attempt to evade the law. The basic theory here seems to be that, in essence, the transaction is not a loan but a sale, and, generally speaking, a seller may fix upon his property any price which he sees fit. Resort was had to the rule that the usury laws, being penal in nature, are strictly construed.

Where the lender is an attorney and exacts a fee for his work in examining the title to the security offered, this will not be construed as usury, unless used as a device to evade the law. It was so held in *Johnson v. Carter*.[14] The court observed that the substance and not the mere form was controlling, but where the fee is in line with the customary reasonable professional charge and is solely for the service and not a part of the consideration for the loan, there is no usury.

Statute of Frauds

While an oral contract for the sale of land is unenforceable under the statute, the court in *Hardy v. Candelain*[15] held that the money paid on

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[12]38 So. 2d 323 (Miss. 1949).
[13]202 Miss. 747, 32 So. 2d 548 (1947).
[14]203 Miss. 38, 33 So. 2d 296 (1948).
[15]204 Miss. 328, 37 So. 2d 360 (1948).

the consideration could be recovered as for money had and received. In *Jones v. Hickson*[16] it was held that a contract to sell "120 acres of land the Old Hatcher Place" was not void. The omission of any reference to the state and county was said to be a "latent defect" which could be repaired by extrinsic evidence.

A timber deed which fails to describe the land is void under the statute as a conveyance of standing timber, yet in *Dixie Pine Products Company v. Breland*[17] it was held to be effective as a license to cut and remove the timber, subject to revocation at any time on notice by the owner. Prior to such revocation, timber severed belongs to the licensee, subject to the payment of the agreed purchase price, and he may enter upon the land and remove it even after revocation of the licence. In *Rowan v. Rosenblatt*[18] the same result was reached under an oral contract of sale.

Mental Capacity

In *Puryear v. Austin*[19] the court held that equity would not uphold a deed when at the time of its execution great mental weakness is shown and the consideration is grossly inadequate. From these circumstances, imposition or undue influence will be inferred.

Corporations

Harris v. Bailey Avenue Park[20] had to do with the extent to which a director may deal with a corporation in the matter of lending it money and acting upon the security taken for the loan. It was held that a director may lend the corporation money and validly take a deed of trust as security; that on default he may foreclose and purchase at the public sale. The mere fact that the bid is for less than the full value does not invalidate the sale, unless the consideration is grossly inadequate. No notice to the corporation of foreclosure other than the advertisement contracted for is required, at least where the sale is not procured by the director-creditor and there is no extraneous element of actual fraud or bad faith involved.

Partnerships

Since a partnership is a contractual relation, the parties must be competent to contract and there must be at least two parties. Thus it was held in *Shemper v. Hancock Bank*[21] that a minor may not become a member of a partnership, and where such a relation was attempted between a

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[16] 204 Miss. 373, 37 So. 2d 625 (1948).
[17] 205 Miss. 610, 39 So. 2d 265 (1949).
[18] 39 So. 2d 873 (Miss. 1949).
[19] 205 Miss. 590, 39 So. 2d 257 (1949).
[20] 202 Miss. 776, 32 So. 2d 689 (1947).
[21] 40 So. 2d 72 (Miss. 1949).

minor and an adult, no partnership resulted. It was held that one seeking to bind such a partnership upon a promissory note acted without a principal and was individually liable.

Sales

A sale contemplates a delivery to the buyer. What will amount to delivery depends on the contract and the circumstances. One of the general rules is that when a specific article is purchased, a tender of delivery is not valid unless and until the article is in proper shape so as not to devolve additional labor and expense on the buyer. Applying this rule, the court in *Morel v. Solomon*[22] held that there was not an effective delivery or tender of an electric washing machine by simply leaving it on the buyer's premises when, under the circumstances, the seller was required to install the machine or place it in such shape that it could be installed by the buyer without more expense than contemplated by the sales agreement.

In *Powell v. Aldridge*[23] it was held that a delivery to the buyer was complete and title passed upon delivery to a common carrier where the sale was f.o.b. the shipping point. Any damage sustained in transit may be recovered by the buyer from the carrier. In case of damage from delay in transit, the seller is not liable to the buyer unless he is shown to have been negligent in the selection of the carrier or method of transportation.

Negotiable Instruments

A corporation of the ordinary type is not empowered to execute accommodation notes and cannot be bound thereon to the payee in the absence of fraud. In *Ketcham v. Mississippi Outdoor Displays, Inc.*[24] the court held that the corporation was not liable upon such a note executed by the president in the corporate name. Since the principal lacked power in the premises, the officer purporting to act as agent was also held not liable. The court distinguished the case where the principal has power to act but the agent lacks authority. In such cases, the agent is individually liable.[25]

Liens

The court dealt with several types of liens and the ever recurring question of priority.

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[22] 203 Miss. 356, 35 So. 2d 314 (1948).
[23] 202 Miss. 648, 32 So. 2d 146 (1947).
[24] 203 Miss. 52, 33 So. 2d 300 (1948).
[25] *Cf.* Shemper v. Hancock Bank, 40 So. 2d 72 (Miss. 1949).

Mechanics

A mechanic has a statutory lien for repairs and mechanical work,[26] but difficulties often arise over questions of priority as against other types of claims, such as those by the lessor of the vehicle or the owner of the legal title retained for security of the balance of the purchase price.

The case of *Martin v. Broadhead*[27] involved a dispute between the mechanic and the owner-lessor, and the case of *Funchess v. Pennington*[28] presented a similar controversy between the mechanic and a conditional vendor of a motor vehicle. In both cases the one in possession took the vehicle to a mechanic for repairs. In both cases the owner was unaware that the repairs were ordered or being made and the mechanic was unaware of the claim of ownership or lien of the conditional sales contract. In the first mentioned case, the court found that the repairs were "necessary to the continued operability" of the vehicle and gave priority to the mechanic's lien. In the second, the court found that the proof failed to establish that the repairs "were reasonably necessary to preserve the truck, enable it to operate in the ordinary way and prevent deterioration," as to which the burden of proof was on the mechanic, and, therefore, declined to enforce the mechanics lien.

Landlords

Phillips v. Box[29] involved a dispute between a landlord and the purchaser of a warehouse receipt covering cotton produced on the rented land. The receipt was purchased from the tenant in whose name the cotton was stored and the receipt issued. It was held that the purchaser took title subject to the lien for rent. The landlord's lien was held to be paramount unless waived, and waiver was said to result only from a showing of "an agreement by the landlord, or conduct tantamount thereto, that the tenant might deal with the cotton as if free from any lien."

Vendors

In the absence of an agreement for retention of title or other type of contract lien, an oral sale and delivery of personal property on credit gives rise only to the statutory vendor's lien.[30] Summons and seizure and not replevin is the method of enforcing such a lien.[31]

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[26]Miss. Code § 353 (1942).
[27]202 Miss. 281, 32 So. 2d 433 (1947).
[28]205 Miss. 500, 39 So. 2d 1 (1949).
[29]204 Miss. 231, 37 So. 2d 266 (1948).
[30]Miss. Code § 337 (1942).
[31]Runnels v. Fairchild, 204 Miss. 287, 37 So. 2d 312 (1948).

Conditional Sales

While for most purposes a conditional sales contract with title retained as security need not be recorded for the seller's protection, the rule is otherwise where the contract is executed out of this state, provided it is considered in the state where executed as creating a lien.[32] This result was reached as to a contract covering an automobile executed in Alabama. The case was controlled by the Alabama law as to the nature of the security and our statute as to the necessity of recording liens on personal property executed out of this state when the property is moved here.[33]

Pledges

Generally on the subject of pledges for security, the court holds that a pledgor has the right to exact strict performance of the pledge contract. On default, title remains in the pledgor, subject to the trusteeship. The pledgee may foreclose pursuant to the contract, but may not be compelled to do so even if authorized or requested by the pledgor.[34]

Mortgages

May the mortgagor and mortgagee of real estate by voluntary conveyance and without foreclosure put a junior lienholder out of the way? Our court recognizes that the "casual reaction of the legal mind" is that this may not be done and that a foreclosure and public sale is necessary. It seems, however, that the question was decided differently more than 50 years ago and the decision has now become a rule of property. It is held in *Jaubert Brothers, Inc. v. Walker*[35] that this may be done "when the property is actually and distinctly worth less than the debt." When questioned by the junior lienholder, it must be shown in support of the conveyance that "the debt was equal in amount to the value of the mortgaged estate; that the equity of redemption was valueless, and hence that no harm came from such acquisition of absolute title to the junior lienholder." It was said that the decision was in accord with a common business custom over a long period of time.

In *White v. Hesdorffer*[36] the court held that when a person "or his assigns" is empowered by deed of trust to appoint a substitute trustee, the term "assigns" comprehends all those who take by conveyance, devise, descent, or act of law. This was held to include the executor of a deceased

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[32]Patterson v. Universal C. I. T. Credit Corp., 204 Miss. 268, 37 So. 2d 306 (1948).
[33]Miss. Code § 870 (1942).
[34]203 Miss. 212, 33 So. 2d 796 (1948).
[35]203 Miss. 242, 33 So. 2d 827 (1948).
[36]202 Miss. 711, 32 So. 2d 442 (1947).

beneficiary, since the legal title to a testator's personal property vests on his death, by act of law, in his executor.

Husband and Wife

Marriages between whites and negroes are illegal in Mississippi, but it was held in *Miller v. Lucks*[37] that such a marriage in Illinois between persons residing there would be recognized to the extent of permitting the husband to inherit intestate property located in Mississippi.

A wife may recover for hospital expenses incurred by her as against a defendant in a personal injury suit, provided she contracted to pay the bills herself and there is nothing to show that she was acting as agent for her husband; otherwise the liability for such expenses is upon the husband exclusively and only he may recover therefor against a third party responsible for the injury out of which the expense grew.[38]

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[37]203 Miss. 824, 36 So. 2d 140 (1948).

[38]Montgomery Ward & Co. v. Nickens, 203 Miss. 195, 33 So. 2d 815 (1948); McLemore v. Riley's Hospital, Inc., 197 Miss. 317, 20 So. 2d 67 (1944).

II

CRIMINAL LAW AND PROCEDURE

*Stanny Sanders**

Because of the large number of cases concerning criminal law that have been decided during the past two years, consideration herein of all cases deserving of comment has not been attempted. Effort has been exerted, however, to choose for discussion those decisions which appear to be of most general interest and application.

Homicide

Dickerson v. State[1] definitely establishes that a trial judge cannot accept a plea of guilty in a murder case and exact the death penalty. If a defendant wishes to plead guilty to a capital offense, he can do so; but the court should not accept such a plea until he has ascertained that the plea is entirely voluntary and that the defendant fully realizes and is competent to know the consequences of such plea. After making these findings, the trial judge must then empanel a competent and impartial jury and require that the circumstances of the crime be put before such jury with such fullness that it will be well advised on the issue of whether a death sentence should be adjudged. After outlining this procedure the court says:

> In view of these essential steps, we think it ought to be, and is, within the discretion of the trial judge whether he will accept a plea of guilty in a capital case or will decline it and put the case to trial on its full merits. If he takes the latter course, nothing is thereby done of which the defendant may complain as being harmful to him, and it is the usual practice in this state to take that course.

The court then goes on to add:

> Let it be distinctly understood that we are not discussing or considering a situation where the district attorney consents to a plea of guilty and agrees to a sentence less than capital. Such a case is not here before us.

In *Shedd v. State*,[2] wherein the defendant had been convicted of murder, the court reversed and remanded the case for a new trial on the ground that since the deceased was committing an unlawful act at the

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[1]202 Miss. 804, 32 So. 2d 881 (1947).

[2]203 Miss. 544, 33 So. 2d 816 (1948).

time of the homicide[3] the defendant could be guilty of no crime greater than manslaughter. There was no eye-witness to the homicide, which occurred shortly after deceased, an officer, had put defendant under arrest and while he was in the process of putting him in jail. There was no showing that the arrest was legally made, the evidence in fact indicating that the arrest was illegal. The court held that under these circumstances, defendant could not be guilty of murder. However, as shown by *Murray v. State*,[4] if an escaping prisoner kills an officer and does not justify his assault as an effort to escape from unlawful imprisonment, but on the grounds of self defense, it is not incumbent upon the state to prove that the prisoner was lawfully detained in order to warrant a verdict of murder.

In *Magee v. State*[5] deceased was menacing defendant with a pistol, and defendant attempted to take it from him. Immediately after the struggle for deceased's pistol, in which struggle defendant was unsuccessful, deceased retaining possession of the weapon, the defendant drew his pistol and killed deceased. The court held that under these circumstances, the defendant was not guilty of murder, the only issue being whether he used greater force than reasonably appeared necessary for his own protection and thus was guilty of manslaughter, or whether he acted in necessary self defense and thus was guilty of nothing.

In *McLaurin v. State*,[6] another case in which the defendant contended that he could be guilty of no crime greater than manslaughter, the homicide took place soon after the deceased had directed some unfriendly language, recently employed in abbreviated form by the President of the United States, at the defendant. The court held that such language does not, as a matter of law, reduce a killing which otherwise would have been murder to manslaughter, restating the doctrine that "mere words of reproach, however grievous or provoking, are . . . not sufficient to reduce to manslaughter what otherwise is murder." The decision is patently concerned with sufficiency of such words as provocation as a matter of law, and it is not believed that a jury could not properly be allowed to consider use of such words in determining whether or not the homicide was committed in the heat of passion.

In *Smith v. State*[7] the court recognized the rule that in cases where all the facts and circumstances of a homicide are in evidence, it is improper to instruct the jury with regard to the presumption of malice arising from the deliberate use of a deadly weapon; but it further said that in such cases the trial court can consider such presumption in deciding whether a murder

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[3]Miss. Code § 2225 (1942).
[4]202 Miss. 849, 33 So. 2d 291 (1948).
[5]204 Miss. 855, 35 So. 2d 310 (1948).
[6]205 Miss. 554, 37 So. 2d 8 (1948).
[7]205 Miss. 283, 38 So. 2d 725 (1949).

instruction should be given. In other words, because of the presumption of malice attending the deliberate use of a deadly weapon, when a homicide results from such a use of such weapon, the issue of murder can be properly submitted to the jury, even though the state fails to produce any evidence of malice or motive and although all the facts and circumstances surrounding the homicide are in evidence, and the jury therefore cannot be instructed as to the aforementioned presumption.

In *Ceary v. State*,[8] a prosecution for felonious assault and battery with intent to murder, the court had before it for reconsideration the following instruction, which had previously been approved in *McCaa v. State*:[9]

> The court instructs the jury for the defendant that if you believe the evidence shows that the defendant had another load in his gun, and could have used it and killed his alleged victim, if he had so desired, but did not do so because he did not want to kill him, you should take this into consideration along with all the facts and circumstances in the case, in determining whether the defendant did intend to kill and murder the prosecuting witness, and if, from all the facts and circumstances in evidence, you have a reasonable doubt as to whether the defendant really meant to murder the prosecuting witness, you cannot lawfully convict him of the offense charged in the indictment.

The court held that this instruction was bad, overruling the *McCaa* case as far as its approval was concerned, and giving the following reason for so doing:

> During the more than forty years since the *McCaa* case was decided, the trend of our decisions has been to condemn any instruction which points out and unduly emphasizes any particular bit of testimony in such a manner as to amount to a comment on the weight thereof.

In *Merrell v. State*[10] the court approved an instruction which illustrates the legal consideration involved when two or more persons shoot at another simultaneously and it is not known who fired the fatal shot. The pertinent part of the instruction is as follows:

> That if you believe from the evidence beyond a reasonable doubt that the defendant, Nolan Merrell, did wilfully, unlawfully,

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[8]204 Miss. 299, 37 So. 2d 316 (1948).
[9]38 So. 228 (Miss. 1905).
[10]39 So. 2d 306 (Miss. 1949).

feloniously and of his malice aforethought shoot the deceased with a pistol at the time that the said deceased received the wounds that caused his death, then you shall find the defendant guilty, even though you may believe from the evidence that another person was at the same time shooting at the deceased and you do not know which person fired the shot, or shots, that actually killed the deceased.

In approving it, the court said:

> The defendant's objection (to the instruction) is that there was no charge or proof of any conspiracy whereas the instruction assumes such fact. It is enough that the defendant was present, aiding and abetting others, to constitute him a principal.

Rape

In *State v. Lindsey*,[11] it was held that an indictment for attempted rape which stated as an overt act on part of defendant that he stalked, chased, and ran after the intended victim in a lonesome and secluded place in the country, almost exhausting her before she reached aid, was demurrable. The reason was that:

> The defendant's purpose, from the verbiage used, could have equally been murder, assault and battery, robbery, or rape. The alleged overt act here described does not exclusively relate to rape; is not solely germane to or cognate with rape alone, and hence, in the instant case is too remote as an element of rape.

In support of its decision, the court cites the case of *Green v. State*,[12] wherein the alleged overt act on part of defendant was that he caught the riding skirt of a woman on horseback, whereupon she whipped her horse and escaped. In that case, it was held that the acts stated were insufficient to constitute an attempt to commit rape.

In *Rodgers v. State*,[13] a case of alleged rape by force, the defendant attempted to show an act of previous unchastity on the part of prosecuting witness on the theory that in prosecutions for rape, evidence of the prior unchastity of the prosecutrix as a substantive defense is admissible. The court held that where the defendant in a forcible rape case interposes a defense of consent, evidence that the general reputation of the prosecuting witness for chastity is bad is admissible.

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[11] 202 Miss. 896, 32 So. 2d 876 (1947).
[12] 67 Miss. 356, 7 So. 326 (1890).
[13] 204 Miss. 891, 36 So. 2d 155 (1948).

Yancey v. State[14] was concerned with a prosecution for violation of the age of consent statute, and the court, citing previous decisions, held that:

> Under the statute covered by the indictment, corroboration must be, not merely of incidental details, but of the commission of the prohibited act. Even though circumstances and admissions may be sufficient to this end . . . it remains true that corroboration must be of the secret part or gist of the crime . . . Mere opportunity creating a possibility is not enough of itself.

In *English v. State*,[15] a case wherein defendant was charged with the rape of a girl under 12 years of age, the trial court erroneously permitted the state to show that defendant committed a like crime on former occasions, on the theory that the evidence was competent as showing a course of behavior and conduct of the defendant and as tending therefore to show his guilt on the particular occasion complained of.

Robbery

In *Newsome v. State*[16] the defendant, with a pistol in his hand, went into the residence of one Mrs. Lusk, who was in bed and who had a pistol lying on a table beside her. She saw defendant and grasped her gun, which he snatched from her and thereupon absconded. Defendant was convicted of armed robbery and the death penalty was imposed. Upon appeal, the case was reversed, the supreme court using the following language in holding that he was at most guilty of simple robbery:

> This evidence discloses that the pistol was not obtained from Mrs. Lusk by putting her in fear of immediate injury to her person by the exhibition of a deadly weapon. While the weapon was exhibited, Mrs. Lusk did not surrender the pistol because thereof, and nothing was said by the appellant indicating that he would use the pistol if she did not turn the one she had over to him. What he did was to take the pistol away from Mrs. Lusk by physical force—by jerking it out of her hand.

In *Williams v. State*,[17] a prosecution for felonious assault with intent to steal, the trial court instructed the jury that if the assault involved was made "with some instrument capable of producing death or great bodily

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[14] 202 Miss. 662, 32 So. 2d 151 (1947).
[15] 39 So. 2d 876 (Miss. 1949).
[16] 203 Miss. 449, 35 So. 2d 441 (1948).
[17] 205 Miss. 515, 39 So. 2d 3 (1949).

harm," the defendant could be found guilty. The supreme court held this instruction erroneous in view of the requirement of Code Section 2011 that the assault be made "with any deadly weapons or other means or force likely to produce death."

Larceny

The case presented by the state in *Thomas v. State*[18] was that defendant arranged for two other men to steal some fertilizer for him. On the night that they were to get it, he went down and joined them, they going inside the place where it was stored and he remaining outside at the door. They hauled the fertilizer to the door and he helped load it from the door into his car, in which he carried the fertilizer off. In accordance with a previous agreement, he paid them for the fertilizer in an amount substantially below its market value. Defendant was convicted of receiving stolen goods, which conviction was reversed by the supreme court on the ground that the case against the defendant was one of larceny rather than of receiving stolen goods and that one who steals property cannot be convicted of receiving, concealing, or aiding in concealing the property stolen.

"Bad Check" Statute[19]

In *Broadus v. State*,[20] defendant arranged to buy some equipment from the prosecuting witness, the agreement being that the transaction was to be for cash and no mention being made of a check. Subsequently defendant's truck picked up and hauled off the equipment; and about thirty minutes later defendant came by and gave the prosecuting witness a check which proved to be bad. Prosecution and conviction under the bad check statute followed, but on appeal the supreme court held that the statute did not apply to this transaction. Since the equipment was delivered and carried off thirty minutes before the check was written, and since no agreement as to a check was made before such delivery, the court held that the check was given for an existing indebtedness and that consequently defendant was guilty of no crime in executing it.

In *Moore v. State*[21] defendant wanted to borrow some money from the prosecuting witness, who refused to make the requested loan, but agreed to cash defendant's check for that amount. Prosecuting witness, engaged in working around a service station, delivered defendant the money about five minutes before defendant got around to signing the check. The supreme court held in this case that delivery of the money

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[18]205 Miss. 653, 39 So. 2d 272 (1949).
[19]Miss. Code § 2153 (1942).
[20]205 Miss. 147, 38 So. 2d 692 (1949).
[21]205 Miss. 151, 38 So. 2d 693 (1949).

and of the check constituted a single transaction, and accordingly upheld a conviction under the statute in question.

Perjury

In *Neeley v. State*[22] it was held that:

> It is an essential element of the offense of attempting to suborn perjury that the accused knows that the testimony which he wants the witness to give is false and that the witness, as well as himself is aware of the falsity thereof.

The court added that such knowledge on the part of the suborned must be charged in the indictment as a fact and not by way of inference, unless, of course, the inference is a necessary or inescapable inference from other facts charged.

In *Polk v. State*[23] it was held that testimony of the circuit clerk and court reporter concerning organization of the circuit court at the term at which indictment charged the perjury was committed was insufficient to prove that the alleged perjured testimony was given in a duly constituted court. Such proof must be made by the official minutes of the court and the official record of the case, or a duly authenticated transcript thereof.

McInnis v. State[24] originated in a divorce trial wherein McInnis was attempting to get a divorce on the ground of adultery. He gave certain testimony on the hearing, and the trial court found that testimony "to be so entirely incredible . . . as to convince the court beyond a reasonable doubt that the complainant McInnis was testifying falsely about the matter in this court in an effort to get a divorce to which he clearly was not entitled."; and pursuant to this finding, the chancellor sentenced McInnis to serve ten days in jail for contempt of court. The chancellor was of the opinion that Code Section 2479, providing for committing and binding over a palpable perjurer to await the action of the grand jury, is not an exclusive procedure, and that a judge can use contempt processes to punish a witness guilty of swearing falsely in his court. Upon McInnis's appeal from the jail sentence, the supreme court held that:

> . . . while there are cases holding that false swearing may be adjudged to be a contempt of court, the presence of certain elements is essential before a judge may find him guilty of false swearing and subject to punishment for contempt, and one of

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[22]202 Miss. 736, 32 So. 2d 449 (1947).
[23]204 Miss. 538, 37 So. 2d 761 (1948).
[24]202 Miss. 715, 32 So. 2d 444 (1947).

> which essentials is that the court must have personal or judicial knowledge of the facts about which the witness has testified and know beyond a reasonable doubt by reason of such personal or judicial knowledge of the facts that the witness has wilfully and corruptly sworn falsely.

Since the discussed "essential" was manifestly not present in this case, the supreme court rendered a judgment for appellant.

Confessions

Confessions have received a great deal of attention from the court during recent terms. As to their admissibility, the court has held in *Pinter v. State*[25] that the threat of the use on defendant of a lie detector test or of a "machine that will read your mind" does not make a confession involuntary. By the same decision, the same is true as regards an accusation by an officer that the defendant is a "damned liar" and a statement by a fellow prisoner that defendant is to be put in a death cell.

The cases of *Morroco v. State*[26] and *English v. State*[27] plainly establish that a defendant wishing to contest the admissibility of a confession is entitled to a full preliminary hearing out of the presence of the jury, and that denial of this right to a defendant is reversible error. In both these cases, a sheriff testified to facts making the confessions admissible, and both trial courts considered that the defendant's evidence could at most raise an issue of fact that could be raised by the defendant before the jury later in the trial. But, as established by the above cited decisions, the admissibility of a confession is a question that must be decided by the trial judge previous to its introduction, and he must give the defendant a full hearing before making a ruling.

The *Morocco* case further considers the question of a confession allegedly made by a defendant whose understanding of English is doubtful, and the decision places upon the trial judge the responsibility of preliminarily determining whether the defendant was capable of making and understanding a confession in English which on trial he claims not to have made, at least with knowledge of the meaning of what he was saying.

In deference to a decision of the Supreme Court of the United States, the Mississippi court has now announced, in *Lee v. State*,[28] that a defendant's denial of the fact of making a confession does not bar him from at the same time objecting to its admissibility on the ground that it was

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[25] 203 Miss. 344, 34 So. 2d 723 (1948).
[26] 204 Miss. 498, 37 So. 2d 751 (1948).
[27] 39 So. 2d 876 (Miss. 1949).
[28] 203 Miss. 264, 34 So. 2d 736 (1949).

involuntary. In so doing, it overruled its previous decision to the contrary in the same case.[29]

In *Moore v. State*[30] defendant was contesting admissibility of a confession on the grounds: (1) that none of his friends and relatives, and no attorney, was summoned to be present when the confession was made, and (2) that he was held incommunicado after the confession had been given and that his preliminary hearing was unnecessarily delayed. The court held, as to the first ground, that the facts disproved defendant's contention, but indicated that even if the facts he alleged had been true, they would not have made the confession involuntary. As to the second ground, the court said that while detention without commitment is, by decision of the United States Supreme Court, a factor for consideration in reaching a conclusion as to whether or not a confession is free and voluntary, it is only where the confession is obtained as a result of an unreasonable delay in taking a prisoner before a magistrate for an examination into his case that his admissions of guilt under such psychological pressure are inadmissible. In the case at bar the evidence showed that even if the unnecessary delay alleged by defendant occurred, it occurred after the confession had been given and therefore could have no effect upon the admissibility of the confession.

Evidence and Witnesses

In *Martin v. State*[31] a son was being prosecuted for a felonious assault made upon his father. The mother testified in defense of the son, and to impeach her the state used a letter she had written to her husband, the prosecuting witness, while he was in the hospital. The court held that the letter was a privileged communication and should not have been admitted into evidence, but it further held that the privilege was that of the wife and not of the defendant and that the defendant could not complain of its violation. The court suggested that in such a case the proper procedure is for the witness to refuse to testify and to appeal for vindication if the trial court attempts to use compulsory process for contempt.

The conduct and exclamations of the prosecuting witness made shortly after a felonious assault had been made upon him by a defendant and while the prosecuting witness was fleeing from defendant, who was armed and in pursuit, were in *Martin v. State*[32] held "verbal acts" so closely associated with the assault as to be admissible. On the other hand,

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[29] 201 Miss. 423, 30 So. 2d 74 (1947).
[30] 41 So. 2d 368 (Miss. 1949).
[31] 203 Miss. 187, 33 So. 2d 825 (1948).
[32] *Supra* note 31.

in *Gholar v. State*,[33] wherein the question of primary importance was that of the identity of the assailant, a conviction was not allowed to stand because the state had been allowed to show that shortly after the assault the prosecuting witness stated that defendant was the person who shot her. Absence of continued aggression by defendant, of course, differentiates this case and the *Martin* case.

In *Ware v. State*[34] a character witness for defendant was asked on cross examination whether or not he had offered to pay $25 to the father and mother of the victim of an alleged rape case if they would drop the prosecution. He denied so doing, and in rebuttal, the state was allowed to present testimony showing such offer. There was nothing to prove that defendant knew of the offer. The supreme court held this testimony incompetent, saying that "obviously, an offer of compromise to be admissible must have been made by the accused himself or by someone actually authorized by him to make it." The court did not discuss the competency of such testimony as showing interest and bias on the part of the witness.

In *Cutshall v. State*[35] it was held that the negligence of defendant as shown by the evidence justified a verdict of manslaughter. In the case, one of the witnesses for the state had made a memorandum of facts at the time of the accident, but on the trial, held some years later, he could not recall the facts, even after reading his memorandum. Defendant objected to his testimony given from this memorandum, and also objected to the form of leading questions put to this witness by the state. The supreme court permitted the leading questions,[36] and with regard to testimony from the memorandum in question, the court said:

> It has been laid down in a number of cases, principally early ones, that to qualify a witness to testify after an attempt has been made to refresh his memory with a writing, he must at least be able to speak from a direct recollection of the fact as to which he testified. It is true that, where the perusal of a memorandum revives the memory of a witness, he should then testify from his refreshed recollection and without the aid of the writing. However, where a witness testifies to making a record at the time of the transaction and that he would not have made it if it had not been true, this is a sufficient basis for him to testify as to the facts as they appear in his record, although he may (not) be able to recall these facts to his memory. Also, a witness may be per-

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[33] 203 Miss. 371, 35 So. 2d 706 (1948).
[34] 204 Miss. 107, 37 So. 2d 18 (1948).
[35] 203 Miss. 553, 35 So. 2d 318 (1948).
[36] 3 WHARTON, CRIMINAL LAW § 1273 (11th ed. 1912).
[37] 70 C. J. 594.

> mitted to testify directly from a memorandum or other writing, as a record of a past recollection, provided after seeing the writing, he has no present independent recollection of the facts set forth therein, he at one time had personal knowledge of such facts, and he knows that the writing is an accurate record thereof.[38]

In *Payne v. State*[39] a state's witness testified in rebuttal, after proper predicate had been laid, that defendant approached him and requested him to give perjured exculpatory testimony. Defendant, who had denied doing any such thing, then offered, but was not permitted, to show in surrebuttal that the witness had approached the defendant and offered to "swear him out" for a monetary consideration. The court held that the rebuttal testimony was competent as an alleged attempt to induce a witness to testify falsely in defendant's defense, but held also that the offered surrebuttal testimony was competent to impeach the credibility of the state's witness.

Done v. State[40] considers the admissibility of "experimental evidence," and cities with approval *Brown v. State,*[41] wherein it is held that:

> Many courts have shown considerable reluctance in admitting what is called in the books 'experimental evidence,' and have said that such evidence should be received with great caution. But the modern tendency is to receive such evidence, when the comparative conditions are such as to be substantially the same in regard to the particular issue in question.

Wilson v. State[42] carried further the prohibition against husband and wife testifying against each other by extending it to a case where the wife was charged with forging her husband's name to a check. By virtue of this holding, a wife, even though estranged, can forge the name of her husband to a check, interpose a defense of consent, and prevent him, ordinarily the only person in the world who can disprove such consent, from testifying. This decision creates a fruitful field of endeavor for those of our citizens who divorce themselves by consent rather than by legal action and who go separate ways and not infrequently acquire new living companions, although remaining in contemplation of law firmly joined in holy wedlock.

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[38]The parenthesized word "not" was omitted from the reporter, no doubt through a clerical error.

[39]204 Miss. 455, 37 So. 2d 743 (1948).

[40]202 Miss. 418, 32 So. 2d 206 (1947).

[41]176 Miss. 448, 169 So. 837 (1936).

[42]204 Miss. 111, 37 So. 2d 19 (1948).

Yarbrough v. State,[43] a rape case, sustained the competency as a witness of the alleged victim, who was five years and four months old.

Searches and Seizures

In *Riley v. State*[44] the court announced that a search warrant retains validity during one search only, and that evidence obtained as a result of a second search with an already used warrant is inadmissible.

Further on the subject of search warrants, it was held in *Buxton v. State*[45] that a warrant returnable on the "_____ day of May, 1948" was void because of the absence of a specific return date, and that evidence obtained thereunder was obtained illegally. However, in *Wince v. State*,[46] failure of the officer to make a return on an otherwise good warrant was held to have no effect on the legality of the search made thereunder.

In *Gause v. State*[47] a highway patrolman engaged in stopping cars and making a routine driver's license inspection, inadvertently let a car pass unstopped. For the purpose of inspecting the license of the driver, he began a chase of the other car, the driver of which, in the opinion of the highway patrolman, drove recklessly after the chase had begun. Upon the car's coming to a stop on a side road which it took during the chase, the patrolman allegedly apprehended the driver for reckless driving and searched the automobile, wherein he found some whisky. The defendant was convicted of the possession of this whisky, but on appeal the supreme court reversed the conviction, holding that when the patrolman began the chase, he had no reason to believe that the defendant was violating the law; and that, therefore, since when the search was instituted, it was instituted illegally, the evidence obtained thereby was inadmissible. In the words of the court:

> Most assuredly, a highway patrolman is not vested with authority to begin chasing a motorist on the highway unless at the time he has good reason to believe, and does believe, that such motorist had violated the law or is violating the law at the time he begins such a chase.

Other interesting features of this case are that the court indicated (1) that there can be no reckless driving conviction when there were no motorists, pedestrians, or property on the highway at the time of the alleged crime susceptible to injury by the accused, and (2) that there is

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[43] 202 Miss. 820, 32 So. 2d 436 (1947).
[44] 204 Miss. 562, 37 So. 2d 768 (1948).
[45] 205 Miss. 692, 39 So. 2d 310 (1949).
[46] 39 So. 2d 882 (Miss. 1949).
[47] 203 Miss. 377, 34 So. 2d 729 (1948).

doubt as to the right of a highway patrolman to stop a motorist for the purpose of ascertaining whether he has a driver's license.

Under the decision in *Boyd v. State*[48] Code Section 2615, permitting officers under certain conditions to search without a warrant an automobile believed to be engaged in transporting intoxicating liquors, does not authorize an officer to invade private premises without a warrant and search an automobile in a garage after the same has come to rest at the completion of a journey during which intoxicating liquors had been unlawfully transported. However, it is not necessary that an automobile must be actually moving on the highway in order that a search thereof may be made without a warrant. It may be searched on probable cause if it is driven off the traveled portion of the highway for any purpose while en route to the place to which the intoxicating liquors are being transported, although its continuous travel along the highway has been interrupted and although it has temporarily departed therefrom to avoid a search or for some other purpose.

Trial and Appeal

On the trial of *Smith v. State*[49] defendant at the end of the state's testimony made a motion for exclusion of the state's evidence, which motion was improperly refused. At the end of the defense testimony and the close of the case, defendant was entitled to a peremptory instruction, but did not request it. The court held that under such circumstances it could not render a judgment for the defendant, but could only remand the case for retrial on the ground that the verdict was against the weight of the evidence. With further regard to required action on the part of defendant in the trial court in order to raise a question on appeal, it was held in *Faust v. State*[50] that in the absence of a waiver by the state, a motion for a new trial on the ground that the verdict is against the overwhelming weight of the evidence must be made in the trial court in order to enable the supreme court to consider the sufficiency of the evidence in support of the verdict. However, in this case it was ruled by the court that where on appeal the state fails to raise the point that no such motion was made, the state is deemed to have waived said point and the court can proceed to consider the question just as if such motion had been made.

Another decision regarding perfecting a record for appeal is *McGee v. State*,[51] wherein the court held that the statute requiring that notice to transcribe testimony be given to the stenographer within ten days after

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[48] 40 So. 2d 303 (Miss. 1949).
[49] 205 Miss. 170, 38 So. 2d 698 (1949).
[50] 204 Miss. 297, 37 So. 2d 315 (1948).
[51] 203 Miss. 609, 35 So. 2d 628 (1948).

adjournment of court is jurisdictional, and that if such notice is not given, the supreme court is without power to require transcribing of the notes, even though the attorney general agrees to such transcription.

With respect to appeals by the state, the case of *State v. Blackburn*[52] makes it clear that neither the state nor a municipality can appeal from a judgment of acquittal based upon a directed verdict where the peremptory instruction was granted because of insufficiency of evidence, even though the question involved in the ruling was one of mixed law and fact.

Goss v. State,[53] which deals with the propriety of giving instructions after argument has begun, firmly establishes a liberal policy in that regard. It is announced as a rule that there is no error in the granting of proper instructions, either during or after the close of the argument in the case, unless the instructions are granted secretly. Further, the court cites with approval the case of *Clarke v. Pierce*[54] wherein it was held that if a jury, after retiring to consider their verdict, request additional instructions, either party may thereupon present to the court proper additional written instructions and ask that they be given, and it will be error to refuse them on the ground that they were requested too late. With regard to the prohibition against secrecy, it is worthwhile to note from the decision that opposing counsel should be immediately apprised of the instruction, although they have to be stopped in argument.

The decisions of *Williams v. State*[55] and *Hamburg v. State*[56] reaffirm already existing procedural rules that have frequent application in felony trials. In the former case, the court reannounced that a defendant can waive arraignment in a capital case, and further held that by standing mute upon arraignment, he does so, thus authorizing the trial court to enter a plea of "not guilty" for him. In the latter case, also capital, the court held that where the defendant was in custody but was absent from the courtroom during the hearing of a motion for a new trial, and the fact of his absence was known to the judge and his attorney, his presence was waived; and that proceeding without him was a matter discretionary with the trial court, being entirely proper in the absence of circumstances showing that he did not get a fair trial. This decision was based on Code Section 2519, providing in part that "in criminal cases, the presence of the prisoner may be waived, and the trial progress, in the discretion of the court, in his absence, if he be in custody and consenting thereto"; and by necessary implication the holding of the court would apply to trials as well as to hearings on motions made before or after trial.

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[52] 34 So. 2d 199 (Miss. 1948).
[53] 205 Miss. 177, 38 So. 2d 700 (1949).
[54] 82 Miss. 462, 34 So. 4 (1903).
[55] 205 Miss. 515, 39 So. 2d 3 (1949).
[56] 203 Miss. 565, 35 So. 2d 324 (1948).

However, different considerations are of course involved when the presence of the defendant is not waived and his absence is involuntary. In *Jones v. State*[57] the defendant made a motion for a continuance, and in support of said motion offered testimony which in the opinion of the supreme court established beyond a question that his physical condition made it impossible for him to go to trial. Nevertheless, the trial court overruled the motion and set the case for trial. Upon the day set, the defendant did not appear, and a trial and conviction were had in his absence. The court held this procedure to be error, saying that the defendant had the constitutional right to be present when tried, and that where his absence was due to his physical condition, it could not be said that he had voluntarily absented himself. The court did not comment on the fact that the defendant was not in custody at the time of trial; and under the statute above referred to, it seems that proceeding without the defendant would not have been authorized, even if the motion for continuance had been properly refused and even if the defendant's physical condition would have permitted his appearance in court.

Williams v. State[58] considers at length the procedure to be observed when there is doubt as to the sanity of the defendant at the time of the trial. Summarized, the holding of the court is that the trial of a defendant when his mind is so clouded that he cannot remember and intelligently relate what occurred at the time of the commission of the crime is, of course, a denial of due process of law; and that when there is a probability that defendant is incapable of making a rational defense, the trial should not proceed until defendant's mental condition has been investigated and it has been decided by a preliminary jury hearing that he is sufficiently rational to make defense. Trial judges, who are urged by the court "to observe this constitutional right of the defendant with meticulous care," are given much discretion. If from their own observation and examination of the defendant they believe him sane and competent, they can proceed with the trial; otherwise they can hold a preliminary sanity hearing. If the former procedure is observed, the judge, if he so desires, can by proper instructions submit the issue of the sanity of the accused at the time of trial to the trial jury along with the other issues involved in the case. Patently, an adjudication by a jury or a judge of insanity of a defendant at the time set for one trial cannot be availed of in a plea of res judicata, or otherwise, by a defendant who, when restored to his sanity, is subsequently put to trial on the merits and interposes a defense of insanity at the time of the crime.

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[57]204 Miss. 284, 37 So. 2d 311 (1948).
[58]*Supra* note 55.

Several cases involving trials in justice courts have recently arisen, and one of them, *Steadman v. State*,[59] eliminates all doubt as to the status of a convicted defendant whose sentence is suspended by the justice, in whole or in part. The sentence is valid, but the suspension is void; and the convicted person stands in the shoes of an escapee—he can be apprehended by the sheriff at any time and required to carry out the sentence of the court.

It is further made clear by the court in *Ball v. State*[60] that a conviction, or a plea of guilty, in a justice court, together with the payment of the fine assessed and costs, is not such a final disposition of the case as to prohibit appeal to the circuit court and a trial de novo.

In *Hegwood v. State*[61] an affidavit for a misdemeanor was filed in a justice court, and the defendant was arrested. Subsequently the justice dismissed the cause without prejudice to the state. Thereafter the misdemeanor involved in the affidavit was considered by the grand jury, which indicted the defendant therefor. The supreme court held this procedure to be legal, saying that one of two courts of concurrent jurisdiction can, by valid order of dismissal, relinquish its acquired exclusive jurisdiction so that the other court can proceed with prosecution of the same offense.[62]

Further with regard to justice courts, it was held in *Ellis v. State*[63] that where the penalty for an offense is either fine, imprisonment in the county jail, or imprisonment in the penitentiary, a justice has no jurisdiction to try the offender on the merits of the case. In the words of the court, quoting from *State v. Sansome*:[64] "In testing an offense as to whether it is a felony or misdemeanor, the power given to imprison in the penitentiary determines it to be a felony."

Indictments

In *Kelly v. State*[65] it was held that a murder indictment omitting the word "did" before the words "kill and murder" charged no offense, and that its invalidity could be raised for the first time on appeal.

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[59] 204 Miss. 322, 37 So. 2d 357 (1948).
[60] 202 Miss. 405, 32 So. 2d 195 (1947).
[61] 139 So. 2d 865 (Miss. 1949).
[62] This decision evidently does not apply to cases where courts in different counties have concurrent jurisdiction: *Coleman v. State*, 83 Miss. 290, 35 So. 937 (1904); Miss. Code § 2429 (1942). These authorities indicate that the county in which prosecution is first begun obtains exclusive jurisdiction which cannot be relinquished.
[63] 203 Miss. 330, 33 So. 2d 837 (1948).
[64] 133 Miss. 428, 97 So. 752 (1923).
[65] 204 Miss. 79, 36 So. 2d 925 (1948).

Wilson v. State[66] holds that where property of a partnership is involved in an indictment, said indictment must state the names of all the partners; and that if some of said names are "to the grand jurors unknown" but are established at the trial, the indictment must be amended so as to include them. Otherwise, there is a fatal variance between the indictment and the proof.

Instructions

Certain "form" instructions frequently requested by defendants have been critically considered by the court in recent decisions, with the result that several have been declared improper. The following "presumption of innocence" instruction was again condemned in *Lott v. State*:[67]

> That the defendant is presumed to be innocent of the offense with which he is charged, until proven guilty beyond every reasonable doubt, and to a moral certainty; and you as jurors are not to consider the fact that an indictment has been returned against him as any evidence of his guilt, but you are to consider him at the beginning and throughout the trial as innocent of the charge until proven against him beyond every reasonable doubt, and to a moral certainty; and this presumption of innocence is no idle pretense, but is a witness declaring for the defendant in thunderous tones that he is innocent, and should go with you into the jury room and be with you during your entire deliberations, calling upon you that the defendant is innocent of the charge against him until proven guilty beyond every reasonable doubt and to a moral certainty; and if there is in your minds a reasonable doubt of the defendant's guilt or innocence, after considering all of the evidence, then it is your sworn duty to return a verdict of 'We, the jury, find the defendant not guilty.'

In declaring this instruction to be erroneous, the court referred to *Carr v. State*[68] wherein the court, in justifying its condemnation, says:

> Once this so-called presumption has placed upon the state the burden of proving guilt it has served its chief purpose. As a procedural aid it compels the state to assume and maintain the burden of proving guilt. This burden never shifts to the defendant, yet there is no such sanctity in this assumption of innocence which renders it immune to actual proof of guilt, or prolongs

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[66] 204 Miss. 111, 37 So. 2d 19 (1948).
[67] 204 Miss. 610, 37 So. 2d 782 (1948).
[68] 192 Miss. 152, 4 So. 2d 887 (1941).

its life beyond that moment when the reason and judgment of the jury accept the guilt of the defendant as proven.

There seems to be no reason why this assumption, although it may be conceded that it 'enters the trial with the defendant', should go 'throughout' the trial despite its early or complete liquidation by overwhelming proof. And we should not indulge the fiction that it necessarily 'goes into the jury room' with the jury. On the contrary, each juror under his oath should carry into the jury room a conviction of guilt if, under the instructions and testimony this assumption has been met and overcome. . . . There would seem to be no need to defend it against some assumed suspicion that it may be taken to be merely 'an idle form or ceremony'; nor that it be given personality and identified as a 'witness.'

The following instruction, which is in effect a variation of the "two-theory" instruction,[69] was held properly refused in the *Lott* case:[70]

That if there is any material fact or circumstances proven by the evidence in this case upon which the jury can place a reasonable construction favorable either to the state or the defendant, it is the duty of the jury to accept that construction favorable to the defendant, although the one favorable to the state is more reasonable.

However, whether or not these decisions with regard to the "two-theory" instruction encompass cases based entirely upon circumstantial evidence is, apparently, an "open" question. Judge Roberds, speaking for the court in *Yarbrough v. State*[71] says:

Defendant requested and was refused what is generally known as the two-theory instruction. He urges, with force, that this was error. The uniform holding of this court is that this instruction should not be given where the guilt does not rest entirely on circumstantial evidence . . . It is the opinion of the writer that the instruction should not be given in purely circumstantial evidence cases, for the reasons, among others, (1) there are always two theories, that of the state of guilt and that of the defendant of innocence, in such cases, and the instruction, in

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[69]In condemning this instruction, the court cited *Runnels v. State,* 96 Miss. 92, 50 So. 499 (1909).

[70]*Supra* note 67.

[71]202 Miss. 820, 32 So. 2d 436 (1947).

effect, is a peremptory for the defendant; and (2) because it places upon the trial judge the burden and danger of saying the case is purely one of circumstantial evidence, whereas, in many cases, this is a very difficult question. However, we need not decide that question here.

Another instruction which recently has been given detailed attention by the court is the one involving the jury's duty regarding the testimony of a defendant. In *Conn v. State*[72] the court held the following instruction properly refused:

> The court instructs the jury for the defendant that this defendant is a competent witness in his own behalf and you have no right to discard his testimony, or look upon his testimony with suspicion, merely because he is the defendant in this case, and that if you have no other reason to disbelieve him, than the fact that he is the defendant, then you must believe his testimony to be the truth.

However, the opinion of the court in *Coleman v. State*[73] had already condemned this instruction.

Prosecution attorneys have also been advised by the court that one of their "form" instructions, when given as the only instruction for the state, constitutes reversible error. In *Ellis v. State,*[74] a case involving the unlawful possession of intoxicating liquors, the state was granted only the following instruction:

> That if you believe from the evidence in this case beyond all reasonable doubt that the defendant is guilty as charged in the indictment, then the form of your verdict should be, 'We, the Jury, find the defendant guilty as charged.'

On reversing the case on an appeal from a conviction, the court said:

> The trouble with the instruction is that it does not define within itself the elements and nature of the crime charged or what the constituents of it are. Instead, it says, as charged in the indictment. In other words, the jurors themselves were referred to, and required to interpret, the affidavit, instead of

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[72]205 Miss. 165, 38 So. 2d 697 (1949).
[73]22 So. 2d 410 (Miss. 1945).
[74]203 Miss. 330, 33 So. 2d 837 (1948).

being informed by the court as to the elements of the crime involved in the law violation charged.

In *Bone v. State*,[75] a subsequent case, appellant argued that the following instruction is erroneous in that the jury was not instructed upon the essential elements of the crime of murder:

> That if you believe from the evidence in this case, beyond all reasonable doubt, that the defendant did wilfully, unlawfully, feloniously, and of his malice aforethought, at the time and place complained of, commit an assault and battery upon the person of one Leroy P. Watts, a human being, with a certain deadly weapon, to-wit, a pistol, by then and there shooting and wounding the said Leroy P. Watts with said weapon, with the felonious intent to kill and murder the said Leroy P. Watts, then it is your sworn duty to find the defendant guilty as charged.

The court, in overruling defendant's contention, said:

> . . . . the defendant did not request any instruction defining the essential elements of the crime of murder, which he could have done had he so desired. It is not incumbent upon the state to request such instruction and this court has never so held.

The case of *Ellis v. State*[76] was not cited by the court, and the above-quoted excerpts from the two decisions are difficult to reconcile, although as a practical matter the instruction in question in the *Bone* case is patterned after a good murder indictment, and therefore appears to be sufficiently descriptive of the crime involved.

Constitutional Law

In *McGee v. State*[77] the Mississippi Supreme Court, in compliance with the decision of the United States Supreme Court in *Patton v. Mississippi*[78] announced its allegiance to the following ruling of the Federal court:

> (1) The 'exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment . . . regardless of whether the discrimination was

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[75] 41 So. 2d 347 (Miss. 1949).
[76] *Supra* note 74.
[77] 203 Miss. 592, 33 So. 2d 843 (1949).
[78] 332 U. S. 463 (1947).

embodied in statute or was apparent from the administrative practices of state jury selection officials.'

(2) The 'fact that no negro had served on a criminal court grand or petit jury for' a long period of time, 'created a very strong showing that during that period Negroes were systematically excluded from jury service because of race.'

(3) 'When such a showing was made, it became a duty of the state to try to justify such an exclusion as having been brought about for some reason other than racial discrimination.'

(4) Evidence by the public officials charged with the duty of selecting the list from which grand and petit juries are to be drawn that they did not exclude Negroes from such list because of their race, unless corroborated by public records or other substantial evidence, does not meet this burden of proof.

Under this decision and those in *McGee v. State,*[79] *Patton v. State,*[80] and *Flowers v. State,*[81] all of which involve the Negro juror question, it appears that in order to observe constitutional requirements, qualified Negroes must be selected for jury duty, and the number of them selected must maintain the same proportion to the total list of jurors drawn as the number of qualified Negroes in the county bears to the total number of qualified jurors.

In *Odom v. State*[82] it was held that neither the state nor the Federal Constitution requires that a defendant charged with a non-capital offense be furnished with counsel by the trial court. The Mississippi court plainly stated that if the Federal Constitution is to be interpreted otherwise, such interpretation will have to be made by some higher tribunal.

Moreover it is now established by virtue of *Stepp v. State*[83] that Code Section 2613, which prohibits the possession of intoxicating liquor, is constitutional. Further, *Murphy v. State*[84] eliminates any doubt that may have existed as to the constitutionality of that part of Code Section 2646 authorizing the abatement as a nuisance, and an injunction against the maintenance, of any place where intoxicating liquor is kept.

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[79] 40 So. 2d 160 (Miss. 1949).
[80] 40 So. 2d 592 (Miss. 1949).
[81] 41 So. 2d 352 (Miss. 1949).
[82] 205 Miss. 572, 37 So. 2d 300 (1948).
[83] 202 Miss. 725, 32 So. 2d 447 (1948).
[84] 202 Miss. 890, 32 So. 2d 875 (1948).

III

DOMESTIC RELATIONS

*Earle L. Wingo**

The purpose of this article shall be to discuss questions relating to domestic relations as reflected by recent Mississippi Supreme Court decisions since the submission of a similar treatment appearing in the December, 1947, issue of the *Mississippi Law Journal.*

During the past two years the supreme court rendered ten opinions in this field of the law. They will, therefore, be discussed briefly in their chronological order.

Transfer of Causes

The case of *Price v. Price*[1] is highly interesting to the bench and bar in that, for the first time, the court held that, unlike all other causes in chancery, divorce actions cannot be transferred. The language of the court, on this question, follows:

> The general statute (Code 1942, Section 1441, 2738) providing that court lacking venue jurisdiction but having jurisdiction of subject matter shall transfer action to the proper venue *is not applicable in divorce suit,* which is governed by special statute providing that divorce bill must be filed in county in which complainant resides if defendant is nonresident.

Restatement of Penalty for Adultery

In the case of *Winfield v. Winfield*[2] the court, following the earlier decision announced in the case of *Hulett v. Hulett*[3] held thus:

> When a divorce has been properly granted because of wife's adultery, she is not entitled to alimony or custody of the children save temporarily as to an infant so young as not to permit separation from it's mother, and save in exceptional circumstances.

Non-Compliance With Residence Statute of Another State

In *Canerdy v. Canerdy*[4] the complainant filed her bill for divorce and other appropriate relief. The husband, the defendant, filed a motion to

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[1]202 Miss. 268, 32 So. 2d 124 (1947).
[2]203 Miss. 391, 35 So. 2d 443 (1948).
[3]152 Miss. 476, 119 So. 581 (1929).
[4]37 So. 2d 490 (Miss. 1948).

dismiss the suit upon the ground that he had theretofore obtained a divorce himself in the State of Tennessee. The complainant attacked the efficacy of the motion, making proof that the defendant had not been a bona fide resident of Shelby County, Tennessee, for two years prior to the filing of his petition for divorce, as required by Tennessee statute.

The chancellor properly sustained the contention of the complainant, overruling the motion to dismiss the bill. The supreme court upheld the finding of the chancellor, holding that the Tennessee decree was void because of non-compliance of the residence statute of that state.

Habeas Corpus Improper Device to Amend Existing Decree Respecting Custody of Children

The recent case of *Hinman v. Craft*[5] reaffirmed the proposition that where a divorce decree awarded custody of children to the wife, and the husband later took possession of children without the mother's permission, and she thereupon sued out a writ of habeas corpus, "the trial court's refusal to give controlling effect to prior decree was error since husband could not use habeas corpus proceedings as a device to amend existing decree."

Habitual Cruel and Inhuman Treatment

Brock v. Brock[6] reversed the decision of the chancellor who held that, from the testimony, there was not sufficient proof of what would constitute habitual cruel and inhuman treatment. The case has no particular value other than that the supreme court reaffirmed its former decisions as to what constitutes the necessary elements of cruel and inhuman treatment.

"Clean Hands" Is Essential When Coming Into Equity

An interesting discussion of the maxim that "He who comes into equity must come with clean hands," is found in the case of *Taliaferro v. Ferguson.*[7]

The supreme court held that the maxim applies to a situation where a husband, in contempt for refusing to abide by the terms of a divorce decree, attempted at the same time to have the former decree modified. The court said that this could not be done:

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[5]204 Miss. 568, 37 So. 2d 770 (1948); citing Herndon v. Bonner, 97 Miss. 328, 52 So. 513 (1910), and Cole v. Cole, 194 Miss. 292, 12 So. 2d 425 (1943).
[6]205 Miss. 66, 38 So. 2d 321 (1949).
[7]205 Miss. 129, 38 So. 2d 471 (1949).

> Equity will not interfere, on behalf of plaintiff, whose own conduct in connection with transaction has been unjust or marked with want of good faith, or has violated any other principle of equity which it is the purpose of equity to sustain.

Further discussing the principles of this maxim, the court stated:

> It is one of the oldest and most universal of principles required to be observed by the court of chancery that, when a party seeks the interposition and aid of that court, such a party must show that in good faith and to the best of his ability and understanding he, on his part, has rendered unto the opposite party all of the rights to which the latter is entitled in respect directly to the subject matter of the suit or petition.

Condonation by Written Contract

The husband and wife in *Starr v. Starr*[8] instituted litigation, each against the other, by original bill and cross-bill, charging cruel treatment in both instances. Later, by written agreement they stated that there had been a reconciliation between them and they had condoned the charges of cruel treatment and that their suits for divorce were being dismissed on certain conditions which related to their living together after the erection of a new home.

It later developed, from the testimony in a suit brought by the husband for divorce, that the wife had breached the written agreement and refused to resume the marital relations, and he sought a divorce upon the grounds of cruelty which he had condoned by said written agreement. The suit said that the wife's irrevocable refusal to live with her husband, pursuant to agreement between the parties condoning prior alleged acts of cruelty, would not revive the acts of cruelty so as to entitle husband to divorce.

Condonation by Reconciliation

The case of *Rogers v. Rogers*[9] involved only the proposition of whether, after a reconciliation between husband and wife and resumption of marital relations, a suit for divorce, based on alleged cruelty prior to reconciliation, could be sustained. The court held that it was not necessary to enter upon a discussion of the effect of condonation in such a situation, because the views of the court are collated in Amis's book, *Divorce and Separation in Mississippi.*

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[8] 39 So. 2d 520 (Miss. 1949).
[9] 39 So. 2d 778 (Miss. 1949); Smith v. Smith, 40 So. 2d 156 (Miss. 1949).

Proposed Amendments to Decrees of Other States

In *Hatrak v. Hatrak*[10] there was involved the question of whether the chancery courts of Mississippi could entertain a petition to enforce a decree of the Indiana court for child support which was past due and could also fix the future amounts to be paid for such purpose. The court held that, since the Indiana statutes did not give to its courts the right to modify decrees rendered in that state as to past due and unpaid allowances, such a petition was maintainable here for such past due amounts so awarded in Indiana. However, the court said that the chancery courts of Mississippi were without jurisdiction to fix amounts to be paid in the future, since the Indiana tribunal having full jurisdiction in the premises has the right to modify the decree as to future allowances at any time.

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[10]39 So. 2d 779 (Miss. 1949).

IV

EVIDENCE

*Richard E. Stratton, III**

The wide variety of cases involving the law of evidence, decided during the past two years, has made it virtually impossible to adopt any strict classification, and for this reason the writer has not subdivided the cases but has only attempted to group, regardless of chronological order, cases which might be generally classified together.

Lay Testimony

In the case of *Ming v. City of Jackson*[1] the defendant introduced certain lay witnesses who testified that the sidewalk, upon which the plaintiff claims to have been injured because of the existence of a hole about eight inches in diameter and four and one-half inches deep, existed, and that they had observed the sidewalk for periods running from two to seventeen years, and that the photographs, introduced by the plaintiff's witnesses, did not reflect the true condition of the sidewalk. They each testified that, at the spot pictured, there had been at the most only a slight depression, described as "saucer-like," about seven and one-half inches in diameter, and one to two inches at its center. The plaintiff's witnesses testified that the situation was a "dangerous one." The testimony of the plaintiff's witnesses was excluded on the basis that lay opinion as to such qualities of human behavior as care, safety, propriety, reasonableness or their opposites is ordinarily excluded as distinguished from lay opinion on such qualities as matters of distance, time, speed, weight and the like.

This case, as to the application of this particular phase of the rule, appears to be one of first impression.

Another case involving the admissibility of lay witness testimony was *Blalock v. Magee*[2] in which the court permitted lay witnesses to give their opinion as to the mental capacity of a deceased testatrix, without first giving the facts upon which their opinions were based. The court held that an expression of an opinion as to the mental capacity of a person, prior to a statement of facts upon which they base their opinion, was not reversible error.

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[1]202 Miss. 260, 31 So.2d 900 (1947).
[2]205 Miss. 209, 38 So.2d 708 (1949).

Expert Testimony

In the case of *Irwin v. Vick*[3] the supreme court declared competent the testimony of an experienced abstracter, who testified as to the existence of a marriage license in the public records of the counties of Adams and Jefferson, and also of the adjoining counties, including Concordia Parish in the State of Louisiana.

This case follows the general announcement of the rule of evidence that any competent person, who shows a sufficient knowledge of judicial records, may testify that a particular fact does or does not appear therefrom. This decision follows the pronouncement of an earlier case, *Bourland v. Hatchcock.*[4]

In *Wroten v. Fenn*[5] the appellant objected to the correctness of a survey, furnished by a surveyor appointed by the court. The basis for this objection was the variance between the survey and the calls of the field notes as respects distances to Amite River, and also as respects the calls upon a small creek or branch; in other words, it was contended that the survey, as made, did not correspond with the old section boundaries as described in government field notes. The court accepted the survey as correct on the basis that it was common knowledge that the rivers and streams in this territory changed their courses in many places by distances, more or less, from a few feet to many feet, and that a survey now made, but which did not precisely check with the location of the stream as shown on the field notes 100 years ago, was sufficient evidence.

Statutes

Section 2525 of the Code of 1942 provides that in all trials for assault and battery or for a simple assault, the defendant may give in evidence, as an excuse or in justification, any insulting words used by the person on whom the assault or assault and battery was committed, and the jury might consider and determine whether such words were or were not a sufficient excuse for, or justification of the offense committed. In *Holliman v. Lucas*[6] the court said that it was within the right and province of the jury to determine whether or not the language employed was sufficient excuse or justification for committing an assault and battery or simple assault. In the instant case, the defendant and his witness testified that he did utter certain vulgar, filthy, indecent and revolting language and vile epithets, which the plaintiff's witnesses disputed, and the court in upholding the finding of the jury, affirmed the fact that it was common

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[3]203 Miss. 44, 34 So.2d 725 (1948).
[4]186 Miss. 223, 188 So. 9 (1939).
[5]203 Miss. 361, 35 So.2d 534 (1948).
[6]202 Miss. 463, 32 So.2d 259 (1947).

knowledge that at some places of public work, and elsewhere, men frequently took liberties in the use of vulgar language and epithets toward one another, which were not commonly deemed by either to be a sufficient excuse or justification, even though they be regarded differently at other places by other men. Frankly, the writer disagrees with this reasoning. Certain vile and filthy words, wherever used, are calculated to lead to a breach of the peace, whether they be said in a man's home, or in a store, or a public building. Such condonation is subject to considerable censure.

Hendrix v. Foote[7] involves the construction of Code Section 9775, which provides in part that parol testimony shall always be admissible to apply to a description of land on the assessment roll or any conveyance for taxes, where such testimony will show what land was assessed to be sold and there is enough of the description on the roll or conveyance to be applied to the particular tract of land by the aid of such testimony. In the instant case, a fractional interest in the oil, gas and other minerals was sold for taxes and the court held that such a fractional interest in land was not a *particular tract of land,* within the meaning of the above statute so as to admit parol testimony.

Judicial Notice

In the opinion on suggestion of error in *Jones v. Gulf Refining Company*[8] the court held that every variety of written evidence of title will be presumed in instances of possession, where the possession has continued for a great length of time without interruption. By reference to the original opinion, we find that the evidence in question was a forfeited tax land patent, executed on July 4, 1881, by the auditor of public accounts to one A. B. Jones, covering the land in question, with no words of limitation of the estate granted to the effect that it was an unexpired lease, and also containing a recital that it was sold previously on the 10th day of May, 1875, for taxes then due the State of Mississippi.

In the case of *McClellan v. Illinois Central Railroad Company*[9] the court announced that it was common knowledge that many passengers on railroad trains are in need of assistance in boarding trains with their luggage, and that unless those in charge offer such assistance, it must be rendered by some person accompanying the passenger to the station. This was a suit by McClellan, who had jumped from a moving train, which had been put in motion while the plaintiff was assisting a passenger aboard. The court held that the evidence was sufficient to show that the conductor and the porter acquiesced in the plaintiff's undertaking to leave the moving

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[7]205 Miss. 1, 36 So.2d 145 (1948).
[8]202 Miss. 705, 34 So.2d 735 (1948).
[9]204 Miss. 432, 37 So.2d 738 (1948).

train, without offering to stop the train for that purpose, and that the porter opened the coach door, and this was construed as an invitation to the plaintiff to get off without the trap door being raised so that the plaintiff could alight from the steps, thereby establishing a breach of duty on the part of the railroad for the plaintiff and warranting a recovery for his injuries.

Measure of Damages

In the case of *Mississippi State Highway Commission v. Smith*[10] the court, in a proceeding of condemnation for a highway, instructed the jury that the basis of diminished value or damages was the value of the tract as a whole before and after the taking, and ruled that factors of personal inconvenience in the building of new improvements, in addition to the estimates of overall depreciation in market value in which such elements would be integrated, were inadmissible. The court said, "The test is an objective or external one and not purely subjective," and further, "the test is the extent to which those whose present or prospective interests will create a market value will take these factors into account." This decision announced generally the accepted basis for damages as set forth in *Mississippi State Highway Commission v. Hillman*[11] and the authorities cited therein.

It appears that the jury was misled by the witnesses, who based their appraisements of value upon an assumption that the plaintiff owned the entire tract and this fact was unwarranted from the record itself, for an accurate reading disclosed that his sons owned a portion of said lands.

In *Mississippi State Highway Commission v. Dodson*[12] the court again followed the general rule as to the measure of damages in a condemnation proceeding, and further stated that, in arriving at an estimate of what value the land would have after the state built a proposed highway, the witnesses were entitled to consider any necessary inconvenience that would result from building the highway across the land, insofar as this would be considered by a would-be purchaser, but were not entitled to express their own estimates of what the damage for inconveniences to the owner would be. The court stated that, although this creates a difficult process of thought, nevertheless it must be done, and cited their former opinions in support of it.

In *Mississippi State Highway Commission v. Loper*[13] the court held that evidence was not admissible to show that an owner's house would

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[10]202 Miss. 488, 32 So.2d 268 (1947).
[11]189 Miss. 768, 198 So. 565 (1940).
[12]203 Miss. 10, 33 So.2d 287 (1948).
[13]33 So.2d 288 (Miss. 1948).

have to be rebuilt and placed on the new highway, and that such fact was not a proper element to be taken into consideration by witnesses in estimating the damages.

Parol Testimony

In *J. J. Newman Lumber Company v. Robbins*[14] the complainant sought to reform a deed to 40 acres of land on the basis that there was a mutual mistake, or that there was an act of fraud on the part of the agent who prepared the instrument in question. Complainant testified that the agreement was for the seller to retain one-eighth of the minerals and the purchaser to acquire seven-eighths of the minerals; yet the instrument, as written, permitted the seller to reserve the entire mineral interest. Complainant testified that he relied upon the good faith of the agent of the seller to prepare the contract as agreed upon, and signed it without reading it and did not discover the alleged variance until completing the last payment. The court first stated that as a general rule proof to sustain a bill to reform an instrument of writing must be such as to establish the essential allegations beyond a reasonable doubt, and although they did not assert in the instant case that such an issue might not be satisfactorily proved by a single witness, they did state that the character, quality and cogency of the testimony of a single witness, even though disputed by another or others, constituted the weight of such evidence, and when the testimony of that single witness is, in many important details, of a doubtful or inconclusive character, that such testimony would not establish the case beyond a reasonable doubt. This pronouncement appears to be substantive in nature, so as to permit few exceptions to be ingrafted on the rule that written instruments may not be altered by parol.

In a will contest found in In Re *Grimes Estate — Weathersby v. Grisham*[15] the court held that hearsay evidence to establish statements made by the mother of the alleged beneficiary under a will, so as to negative delivery of the will, and the signing and execution thereof, were not admissible. The court further held that such statements were not competent, and could have been competent only in the event the maker thereof had an interest in the property devised and bequeathed by said will, or used to impeach or contradict her statements as a witness. As to the first ground, the maker of the statements was not a party to the litigation, and took nothing whatsoever under the will, nor was she a witness either so used on behalf of the proponents or adversely by the contestants. Such *extra judicum* statements to another cannot be used to establish negative facts supporting a will.

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[14]203 Miss. 304, 34 So.2d 196 (1948).
[15]203 Miss. 416, 34 So.2d 197 (1948).

In supporting the principle that official records, required by law to be kept, import on their face verity and genuineness, the supreme court, in the case of *Entrekin v. Tidewater Associated Oil Company*[16] held that oral testimony or proof, which contradicted, altered or changed the minutes of the county board of supervisors, which appeared regular on their face, was not competent.

Going further, the court refused oral proof or testimony as to the genuineness of the signature of the president of the board of supervisors on the ground that such oral opinion, particularly where many years had elapsed, would produce utter chaos in judicial proceedings.

In *Owen v. Sumrall,*[17] which was an action by a seller of cattle against one who allegedly agreed to pay drafts drawn by the cattle buyer on defendant in favor of seller, in payment of purchase price of cattle until defendant should notify seller to the contrary, this court held that evidence by the defendant's bookkeeper, and a part-owner of the stockyards, asserting that a draft drawn by a third person would be paid until notice to the plaintiff to the contrary, was admissible and relevant to the issue, which was the existence or non-existence of an agreement by defendant to pay drafts drawn by a third person upon him in favor of the plaintiff, in payment of the purchase price of certain cattle, unless the defendant should notify the plaintiff to the contrary.

In *Claughton v. Leavenworth*[18] the court permitted two private persons, who were bidders at a tax sale, to testify as to the general course of conduct of said sale, invoking, therefore, a general principle of law that when on any serious occasion a uniform method of conduct is shown to have been openly and publicly pursued, it is a reasonable inference, sufficient to support the affirmative of the issue, that as a possibility in regard to a particular event in the course thereof, the same method was pursued. Such testimony was permitted, however, only in view of the fact that the tax collector's record was capable of interpretation that separate sales of contiguous tracts were made, and equally capable of interpretation that a single sale was made, thereby creating a self-contained "latent ambiguity," wherein testimony of private persons becomes admissible to show whether or not separate sales were made.

Hearsay

On the hearing of the suggestion of error in *State v. Cummings*[19] the appellant sought to introduce new evidence, which was a receipt in the

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[16]203 Miss. 767, 35 So.2d 305 (1948).
[17]204 Miss. 15, 36 So.2d 800 (1948).
[18]204 Miss. 595, 37 So.2d 776 (1948).
[19]203 Miss. 583, 35 So.2d 636 (1948).

form of a certified copy from the records of the state land commission. The court refused to admit such evidence and stated that evidence of the date of payment of a fee for a forfeited tax land patent was a factual transaction, which must be proven as any other fact is ordinarily proven; and further, that it was not such a record as to which judicial notice could be taken by the court.

In the suit based on an open account for merchandise sold and delivered to a decedent's estate, the court admitted the seller's ledger to prove the amount owed by the decedent's estate, although it appeared that the items in said ledger were not entered until some time after the sale and delivery of the merchandise but where such delay was explained and the account was established by other original records. This is the evidence phase of the case of *Payne Plumbing and Supply Company v. McMurtray's Estate.*[20]

Miscellaneous

In a civil suit an instruction to the jury to return a verdict, if they believed certain facts from the evidence, was not error because of the omission of the qualifying phrase, "preponderance of," before the word, "evidence." The court reasoned that the omission of such words, or similar words, could not have been misleading to a jury, and refused to disturb the verdict unless it was manifest from the record that such verdict was against the great weight of the evidence. The court here indulged in a proper assumption that, unless the contrary is shown, the verdict is presumed to represent the conclusion of the jury upon the comparative force and weight of the evidence.[21]

In *Danciger Oil and Refining Company v. Free*[22] the court held the evidence insufficient to establish an employer's negligence, proximately causing the loss of the eye of one employed by Danciger as a driller, so as to render it liable to the employee in damages. In rejecting the evidence that a certain event transpired as a result of a stated condition, the court enunciated the rule that courts must act on reasonable possibilities, and to prove a possibility only, or to leave the issue to surmise or conjecture, was insufficient to sustain a verdict and trial at the common law. In this case the employee was using a small ballpeen hammer upon a bent pin in a link of an old chain, and the blow from the hammer caused the unusual event of a sliver of steel flying from the pin in the link in the vise and into the appellee's eye, thereby blinding him. The court stated that this

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[20]203 Miss. 334, 34 So.2d 676 (1948).
[21]Gregory v. Williams, 203 Miss. 455, 35 So.2d 451 (1948).
[22]204 Miss. 870, 35 So.2d 542 (1948).

was a simple operation with a simple tool and that the employers were guilty of no negligence, proximately causing the injury of the appellee.

In *McCoy v. McRae*[23] the court held that a trustee's notation on the notice of trustee's sale, containing the words, "Posted on the bulletin board in the courthouse at Quitman, Clarke County, Mississippi, this the 24th day of April, 1947," was *ex parte* in nature, and since not referred to in the trustee's deed or made a part thereof by any recital in it, was incompetent as evidence to prove the posting on the bulletin board as required by law.

In *Caruthers v. Panola County,*[24] which involved a beer and wine election, the court held that, in absence of proof to the contrary, it is presumed that public officers perform their duty in the manner required by law, and that this presumption applied to the minutes of the meetings of the board of supervisors, and further that the burden is upon the person challenging the legality thereof to show that the meeting was illegal.

In *McNatt v. Hyman*[25] the court again utilized the presumption that public officials performed their duties in the manner required by law, and held in the instant case that, in the absence of a contrary showing, it was presumed that the Tax Collector of Marion County, who assessed the minerals in question, performed his statutory duty, and further, that he reported each month these additional assessments to the board of supervisors of said county.

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[23]204 Miss. 309, 37 So.2d 353 (1948).
[24]205 Miss. 403, 38 So.2d 902 (1949).
[25]204 Miss. 824, 38 So.2d 107 (1948).

V

INSURANCE

*Earl T. Thomas**

Insurance litigation, which during the "depression" years figured prominently on our supreme court's docket, in late years has been reduced almost to a state of quiescence. When only six reported insurance decisions have been rendered by the court within the past two years, this status is but confirmed.

Life Insurance

In the case of *Life and Casualty Insurance Company of Tennessee v. Kelly,*[1] the company, in an action brought by the beneficiary, wife of insured, on a life policy, defended on the ground, and sought to avoid the policy because, of alleged misrepresentations by the insured in his application therefor, made within the two-year contestable period, that insured had never been told that he had any heart trouble and that he had never had any heart disease. The testimony, without dispute, showed that insured, who lived to be approximately thirty-four years of age, was born as what is called a "blue baby," and that, therefore, he had some impairment of the heart due to the fact that he was generally below par in physical strength and did not breathe normally. The proof further developed, however, that insured had "worked his way through school" and for the five years preceding his death had lost but two weeks from his work as a rodman in the engineering department of the state Highway Commission, and then only because of a spell of influenza. He died of an abscess on the brain. The policy provided that all statements made by the insured "shall, in the absence of fraud, be deemed representations and not warranties."

The court held in the above case that no fraud was established, and that even though the information called for was material to the risk and that the policy would not have been issued except for the negative answers of insured in his application, nevertheless, the answers in question were in fact true in the sense that the applicant would naturally have understood the questions. The court adverted to the well-defined distinction between "warranties" and "representations," the latter of which need only to be substantially true, and if not material to the risk, in the absence of fraud,

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[1]202 Miss. 319, 32 So.2d 120 (1947).

their falsity will not invalidate the policy. In its conclusion, the court had occasion to distinguish the case at bar from earlier cases.[2]

Mabon v. White[3] was an action between rival claimants to the proceeds of a life policy paid into the chancery court by the Lamar Life Insurance Company pursuant to interpleader. Appellant Mabon was the administrator of the estate of one Mrs. Laura J. M. White, deceased, said intestate having been the named insured in such policy. Appellee White was the administratrix of Thomas W. White, deceased, which intestate was the named beneficiary in such policy and was the sole heir at law of his wife, the said insured. The insured and her husband were both killed in an automobile accident, with the husband surviving insured by approximately one-half of an hour. No contingent beneficiary was named in the policy, and the policy named said husband as beneficiary with right of revocation, and "subject to the terms and conditions of the policy." It was further provided therein that the same should mature as a death claim "upon the date of receipt at the home office of the company of written proof, satisfactory to the company, as to occurrence and the cause of the insured's death." Other provisions thereof were cited which provided that if the beneficiary's death occurred prior to the maturity of the policy as a death claim or subsequent to the maturity of the policy as a death claim but before settlement had been completed under the policy, then that such death of beneficiary during said time would terminate his right to receive the proceeds thereof.

The court pointed out that ordinarily the administratrix of the husband beneficiary's estate would have been entitled to collect and receive the proceeds with right to administer thereon, but it concluded that under the terms and provisions of this particular policy that the administrator of the insured wife's estate was thus entitled to collect, receive and administer the proceeds, and hence reversed and rendered the cause in favor of appellant.

The authority of a cashier in an insurance company's agency office came in for consideration in *Gravlee v. New York Life Insurance Company*.[4] The action was one in the chancery court by appellant to compel the appellee to mark two policies of life insurance on complainant's (appellant's) life as "paid up" or to issue to him "paid up" policies. In 1924, appellee issued to appellant two policies of insurance on his life, commonly known as ordinary life policies, in the sum of $2,000 each. Insured

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[2]Fidelity Mutual Life Insurance Co. v. Miazza, 93 Miss. 18, 46 So. 817 (1908); New York Life Insurance Co. v. Price, 16 F.2d 660 (CCA 5th 1927); and Home Life Insurance Co. v. Madere, 101 F.2d 292 (CCA 5th 1939).

[3]202 Miss. 305, 32 So.2d 191 (1947).

[4]202 Miss. 521, 32 So.2d 569 (1947).

punctually paid all of the premiums thereon and left the annual dividends with the company for a period of twenty years, at the expiration of which insured demanded the same relief as prayed for in his suit.

About three years after the issuance of the two policies, insured began negotiations with the company for the addition of disability and double indemnity benefits and had in the meantime received information from some source that if he left the dividends with the company the insurance would mature as paid-up policies within twenty years. Therefore, on September 10, 1927, insured addressed and mailed a letter to the company at Jackson, Mississippi, stating his understanding aforesaid and further requesting the disability and indemnity benefits. By a letter dated September 13, 1927, the cashier of the Jackson agency office of the company replied to insured and stated that the latter was correct in his assumption that said policies would become paid-up in twenty years if all dividends were left with the company, and the cashier enclosed forms to procure the disability and double indemnity benefits. The policies on their face were shown to be ordinary life policies and the application therefor signed by insured contained language to the effect that only the President, a Vice-President, a Second Vice-President, a Secretary, or the Treasurer of the Company could make, modify or discharge the contracts or waive any of the company's rights or requirements.

It was further shown in the above case that had the annual dividends under the policies continued to be as much as they were in 1927 and if the interest rate had remained as much as it was at that time, then at the end of twenty years the cash value of the policies, together with the dividends and interest, would have been sufficient to have enabled the company to mark the policies as paid-up at the end of twenty years. The policies provided, however, that the amount of dividends would be determined annually by the board of directors and further that the interest rate was subject to change. The court held that the cashier in the agency office had no authority to bind the company by contract or by modification of the original contracts of insurance or waiver of rights and conditions therein, and that hence the trial court correctly denied the relief sought by insured.

In *White, Insurance Commissioner v. National Old Line Insurance Company,*[5] the insurance company sought to enjoin appellant commissioner from enforcing a ruling prohibiting it from including a "survivorship bonus" provision in life policies written in Missssippi. From a judgment granting a permanent injunction, the commissioner appealed, and on

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[5]203 Miss. 752, 34 So.2d 234 (1948).

appeal the supreme court reversed and rendered judgment in favor of the commissioner.

The questioned provision was one wherein the life policy incorporating the same required the company to pay to holders of policies, which were written in a particular calendar year and which were in force at end of 20 years, proportionate share of funds accumulated by company's annual payment from surplus of $5.00 for each $1,000 of insurance written during such year.

The commissioner had previously approved such provision, but later, on advices from the attorney general, disapproved the same and forbade the company from inserting such in their future policies. The court held that the commissioner was well justified in his prohibition against the inclusion of this clause, because the bonus provision did not comply with Code Section 5680, for the insurance contract including it did not "distinctly state the amount of benefits payable." Dividend-sharing provisions were clearly distinguished from such "survivorship bonus" provisions. The court further stated that, had the question been close or doubtful, the judgment of the commissioner, when exercised in a sound manner as between the people and insurance company, was entitled to much weight.

Property Insurance

In *Boston Insurance Company v. Wade,*[6] the cause was reversed and remanded because the trial court had committed error in granting plaintiff-policyholder Wade an instruction which permitted the jury to return a verdict for an amount which plaintiff "sustained by reason of the collision with his truck, less the sum of $50.00" and in admission in evidence, over the company's objections, of proof of certain elements of damage not covered by the policy or speculative in nature. The policy sued on was one insuring owner Wade against damage to a certain truck from collision, with the usual $50 deductible provision applicable to each collision or upset, but with certain limits of liability therein set forth. Among such limitations was one that the company's liability should not exceed that sum which "it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation . . ." Such limitation was ignored in the condemned instruction aforesaid, and was likewise lost sight of by the trial court in permitting proof of (1) damage to a certain wooden body placed on the truck after issuance of policy, (2) the fact that if the truck was repaired it would not be as good as new, and (3) an estimate of damage not presently discoverable on inspection and repair.

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[6]203 Miss. 469, 35 So.2d 523 (1948).

Casualty Insurance

The court had for consideration the construction of an automobile liability policy in the case of *Fleming v. Travelers Insurance Company.*[7] Suit in the chancery court originally against Travelers Insurance Company on November 8, 1943, was brought by appellants, the latter of whom had procured a judgment on April 24, 1942, for personal injuries arising out of an automobile accident, against one Stewart, the latter being the named insured in a certain automobile liability policy issued in the name of "The Travelers Indemnity Company and The Travelers Fire Insurance Company, Hartford, Connecticut." The issuance in the names last mentioned was ascertained after the original defendant had answered interrogatories propounded, whereupon the complaint was amended by three different amendments, the first being made April 25, 1945, bringing in these two additional defendants.

Defendant companies defended and prevailed in the trial court on the grounds: (1) the automobile involved in the collision was owned by a member of the insured's household; (2) there was no notice to the insurer as required by the policy; and (3) the bar of a statute of limitations provided in the policy of two years and one day. The supreme court made summary disposition of defense (2) and held defendants had timely notice of the accident and of the suit. As to defense (3) aforesaid, the court held that the action within two years and a day against the parent company, Travelers Insurance Company, whereupon answers to interrogatories revealed for the first time the names of the subsidiary companies issuing the policy, who had a common agent, and consequent amendments of the complaint thereafter and process on the subsidiaries, caused the action properly to lie and not be barred against the subsidiaries, because no new cause of action was presented by the amendments though the latter were filed after two years and a day.

The interesting question was that raised by defense (1) above. The injuries to complainant, for which she recovered judgment against Stewart, were caused while Stewart was driving an automobile which belonged to his wife, but which was not the automobile described in the liability policy. The policy provided liability insurance was afforded Stewart also with respect "to the operation of any other private passenger automobile by any such insured . . . provided . . . (b) such use is with the permission of any person having the right to grant such permission; and (c) the automobile is not (1) owned in full or in part by or registered in the name of the named insured or any member of the named insured's household . . ." The crucial issue was whether or not his wife, to whom the

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[7] 39 So.2d 885 (Miss. 1949).

automobile causing the tort belonged, at the time thereof, was a "member of the named insured's household."

The facts in the case showed that Stewart had been estranged and separated from his wife for about five years, though the former had purchased, and then owned, the home in which his wife was living in New Orleans. Stewart had not spent a single night at home for over five years, although he visited there on rare occasions, at which time the wife would leave the room to avoid him. A divorce was procured by her in 1944, about three years after the accident. Stewart, in the meantime, had been living with another woman in Alabama, by whom he had two children. The court pointed out that practical considerations must come into play in the interpretation of the insurance contract, and held that the common denominator was the evident purpose of the contract involved. Multiple coverage of several vehicles owned by members of same family, who, by their close intimacy, may be expected to use each other's automobiles without hindrance and with or without permission was that which was sought to be avoided by the quoted provision of the policy. Tested by this principle, the court held, under the peculiar state of facts presented, that Stewart was covered by the policy and that the plaintiff, appellant, was entitled to the relief prayed for and satisfaction of the unpaid amount of her judgment, being within the limits of the policy.

VI

PLEADING, PRACTICE AND PROCEDURE

*O. B. Triplett, Jr.**

Introductory

Civil procedure, embracing the rules of practice and procedure, whereby rights are effectuated through the successful application of the proper remedies, is perhaps the weakest spot in our system of jurisprudence. The work of the supreme court is to so interpret ofttimes careless legislation and historic common law rules as to keep them consistent with common sense and the rules of fair play.

Jurisdiction

A determination of jurisdiction is the first step in procedure. In *State v. Rogers*[1] our court held that the State of Mississippi does not legally become a party to a suit brought on its behalf by an officer having no authority so to do; and in *State v. Southern Pine Company*[2] the trial court was declared to have been without jurisdiction of a suit against the state to avoid tax sales to the state of lands which had already been struck from his records by the land commissioner with the written approval of the attorney general. It is believed that the right to bring such an action should be provided by appropriate legislation.

In *Coleman v. Lucas*[3] the court held that the circuit court was without jurisdiction to call an election where the plaintiffs had not first exhausted the remedy prescribed by statute, on the principle that where a statute creates a new right and provides for its enforcement an adequate remedy, which is not by its terms cumulative, the prescribed remedy is exclusive.

And in *Martin v. Adams Mercantile Company*[4] the court recognized the well established rule that no appearance by a defendant operates to admit jurisdiction of the subject matter.

Parties

Khoury v. Saik[5] applied the rule that want of jurisdiction of a party may be raised for the first time on appeal. In that case a non-resident minor was an indispensable party and effectual process was not served on him. The court held that his acts in filing an answer and appearing

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[1]39 So.2d 533 (Miss. 1949).
[2]205 Miss. 80, 38 So.2d 442 (1948).
[3]39 So.2d 879 (Miss. 1949).
[4]203 Miss. 177, 33 So.2d 633 (1947).
[5]203 Miss. 155, 33 So.2d 616 (1947).

as a witness did not operate as an entry of appearance, and the decree rendered was not only void as to him but also as to all of his co-defendants.

Pleading

In two cases, *Stockstill v. Gerson*[6] and *Griffith v. Goodin*,[7] the court held that a plea of general issue to a sworn itemized account entitles the defendant to make any and all defenses, holding that Code Section 1754 is a rule of evidence and not one of pleading and practice.

In any suit the plaintiff can have relief only on the case made by his complaint,[8] which must not only show a right in himself which has been infringed, but also that his harm is not merely technical.[9] However, where justice may be promoted by a trial on the merits, the court should overrule a demurrer thereto, even though on technical points the demurrer is sustainable.[10]

Where a demurrer is sustained to a cross bill in equity, the trial court has no right to render final judgment for complainant, on bill and answer, without hearing any evidence, as was done in *Natis v. Jackson*.[11]

If a declaration is defective, the court in *International Order v. Barnes*,[12] held that it can be effectively amended by motion to amend and an order thereon which incorporated the text of the amendment.

Montgomery Ward and Company v. Nickens[13] declared a bill of particulars to be the amplification of a pleading, and held that evidence offered in variance therewith must be objected to promptly, if it is to be excluded.

Trial

In jury trials the right of each party defendant entitled to four peremptory challenges to complain of a denial thereof is waived where all of the defendants accept the jury after exercising only three challenges.[14]

While the instructions to the jury will be considered together in determining whether the law has been fairly and accurately stated for the guidance of the jury, the court will reverse where an instruction fails to

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[6]35 So.2d 60 (Miss. 1948).
[7]202 Miss. 548, 32 So.2d 743 (1947).
[8]Allison v. Allison, 203 Miss. 20, 33 So.2d 619 (1948).
[9]Jaubert Bros. v. Walker, 203 Miss. 242, 33 So.2d 827 (1948).
[10]Goff v. Randall, 39 So.2d 881 (Miss. 1949).
[11]205 Miss. 490, 38 So.2d 925 (1949).
[12]204 Miss. 333, 37 So.2d 487 (1948).
[13]203 Miss. 195, 33 So.2d 815 (1947).
[14]Meridian City Lines v. Baker, 39 So.2d 541 (Miss. 1949).

hold the jury within legal bounds[15] or where it is contradictory of other instructions and contrary to law.[16]

Where evidence is offered in rebuttal which should have been introduced in chief, the rule of exclusion which applies in cases at law is not applicable in equity, since it is the duty of the chancellor to hear all the facts, even though it becomes necessary to remand the case to rules for their further development.[17]

Judgment

Since the basis of a plea of res judicata is a former hearing and a judgment involving the merits, the plea cannot rest on mere administrative action but it can be based upon judicial affirmance of administrative action.[18]

However, where grounds asserted in the trial of *Williams v. Patterson*[19] were available on a former judicial trial, the plea was upheld, upon the reason that a litigant cannot try his case piece-meal.

New Trial

In *Rawson v. Blanton*[20] the court held that a question of variance cannot be raised on a motion for a new trial, where it was not raised before verdict by objection to the testimony. It also said that a party is not entitled to a new trial for newly discovered evidence where the rule governing such procedure is not complied with.

Likewise, in equity, leave to file a bill of review based on newly discovered evidence must rebut all inferences of a want of diligence and must affirmatively show reasonable diligence in discovering the evidence,[21] although leave is not necessary to the filing of a bill of review for error apparent.

Appeal and Error

Interlocutory Appeals

The interlocutory appeal still persists as a favorite step in procedure, despite the large number of such appeals which are dismissed by the supreme court. From the action of chancellors in allowing these appeals

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[15]Stevenson v. Robinson, 37 So.2d 568 (Miss. 1948).
[16]Wallace v. Billups, 203 Miss. 853, 33 So.2d 819 (1948).
[17]Cotton v. Cotton, 203 Miss. 316, 35 So.2d 61 (1948).
[18]Viator v. Stone, 203 Miss. 109, 33 So.2d 310 (1947), *suggestion of error sustained*, 37 So.2d 1 (Miss. 1948).
[19]203 Miss. 865, 34 So.2d 366 (1948).
[20]204 Miss. 851, 35 So.2d 55 (1948).
[21]Dillon v. Hackett, 204 Miss. 464, 37 So.2d 744 (1948).

with such frequency, it would seem that revision and restatement should be given to the formula upon which they are allowable.

Thus, in *Jones v. Hickson*[22] an interlocutory appeal from a decree overruling a demurrer to the bill was approved because of an apparent confusion in the opinions of the supreme court; and a similar appeal was retained in *Trippe v. O'Cavanagh*,[23] where the demurrer challenged the jurisdiction of the chancery court.

On the other hand, similar appeals in *Wilson v. Wilson*[24] and *Hardy v. Candelain*[25] were dismissed for the reason that they would not settle any controlling principles of law involved.

An interlocutory appeal was allowed in *Harris v. Bailey Avenue Park*,[26] where the decree appealed from was final on the question of title to real estate, in order to settle the controlling principles of law and to avoid an accounting if the case was reversed.

In *Bond v. Anderson*[27] the defendant was adjudged guilty of contempt for violating an injunction, but imposition of penalty was deferred until the court could determine if the defendant would continue violation. The court held that the decree was not final and, therefore, not appealable.

Roach v. Black Creek Drainage District[28] involved an appeal from a circuit court order sustaining a demurrer to a petition for a writ of mandamus and granting an appeal. The court dismissed for the reason that the order was not a "final judgement," stating that appeals from interlocutory orders apply only to cases in equity.

Notice to Transcribe

In *Shaw v. Bula Cannon Shops*[29] judgment was rendered for defendant. The plaintiff gave notice to transcribe the record and thereafter filed a motion for new trial, which was overruled. The court held that the notice was sufficient, but implied that it could not have been given between the filing of and the order on the motion.

Notice to transcribe is held to be jurisdictional. Yet the appellant is allowed six months to file bond, until which time the court reporter withholds any response to the notice. It would seem more practical to reduce

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[22]204 Miss. 373, 37 So.2d 625 (1948).
[23]203 Miss. 537, 36 So.2d 166 (1948).
[24]202 Miss. 540, 32 So.2d 686 (1947).
[25]204 Miss. 328, 37 So.2d 360 (1948).
[26]202 Miss. 736, 32 So.2d 689 (1947).
[27]203 Miss. 228, 33 So.2d 833 (1947).
[28]41 So.2d 5 (Miss. 1949).
[29]205 Miss. 458, 38 So.2d 916 (1948).

the time for appeal to three months and to require that notice to transcribe be given within ten days after bond is filed.

Limitation of Actions

Two interesting cases were decided which involved this subject. In *United States v. Williams, Richardson Company*[30] the court held that the lien of a judgment in favor of the United States, enrolled pursuant to state law, was barred after seven years from its rendition.

And in *Frederick Smith Enterprise Company v. Lucas*[31] an action filed in a state court within one year after the same action had been dismissed in Federal district court for want of jurisdiction was not barred by limitations which had not run when Federal court action was begun.

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[30]40 So.2d 177 (Miss. 1949).
[31]204 Miss. 43, 36 So.2d 812 (1948).

VII

PUBLIC LAW AND TAXATION

*Sydney A. Smith, Jr.**

Taxation

Privilege Taxes

In the case of *Bailey, State Tax Collector v. Southern Bell Telephone and Telegraph Company,*[1] it was held that the telephone company was not liable for the privilege tax imposed by Section 9432, Code of 1942, upon a commercial advertising agency on account of the advertising and business listings in the rear portions of telephone directories, commonly known as the classified section of the directory. The court stated that the distribution of the directories and the advertisements and listings contained therein was made in furtherance of the taxpayer's main business of furnishing telephone service to the public, and the taxpayer was not a commercial advertising agency within the terms of the statute.

A more difficult question was presented in the case of *Craig v. Mills.*[2] The taxpayer was a partnership located in Tennessee, but having various central offices in Mississippi from which several agents solicited the taking of portraits from surrounding residents. One person at each of the central offices actually photographed the customers. The negatives were mailed to Tennessee for development and processing, the finished portraits being mailed back to the central offices in Mississippi where delivery was made and payment received. It was held that the privilege tax provided for in Section 143 of Chapter 137, Laws of 1944, was applicable only to those agents actually taking the photographs in this state because to hold the tax applicable to soliciting agents would violate the interstate commerce clause. However, the court held that the statute did not violate this clause as to the photographers, even though the privilege tax levied on photographers who had their negatives developed and processed out of the state was $5.00 higher than on those performing all the services within the state. The court relied strongly on its decision in *Stone v. Memphis Natural Gas Company,*[3] wherein it was held that businesses in interstate commerce must bear their fair share of the local tax burden.

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[1]40 So.2d 606 (Miss. 1949).

[2]203 Miss. 692, 33 So.2d 801 (1948).

[3]201 Miss. 670, 29 So.2d 268 (1947).

Gasoline Tax

State v. Republic Oil Refining Company[4] involved an interpretation of Code Section 10017, 10018, 10020, 10055 as relating to whether the tax should be collected on the gallonage shipped to dealers according to the shippers invoice or on the actual gallonage received. Section 10018 allows a 2 per cent deduction from the "correct invoiced gallons." The court held that the 2 per cent deduction was to be taken from the actual gallons of gasoline received by the dealer, and that in finding the actual gallons received the shippers' invoices were to be used, but were to be corrected to the actual gallons received. The claim of the state that the 2 per cent deduction was allowed by the statute as a blanket deduction to compensate for losses in shipment was held to be without foundation, and the deduction was said to be given to allow a blanket deduction from the amount actually received on account of losses by evaporation and otherwise after arrival.

Sales Tax

The interpretation of Code Section 10,111 was involved in *Stone v. Taylor Machinery Works.*[5] The question presented was whether sales by the manufacturer of a machine called "Logger's Dream" to manufacturers of lumber were to be treated as wholesale sales or retail sales, where it was shown that the great majority of lumber manufacturers in Mississippi did not use the instrument for logging, but that logging was its primary purpose. The court at first held that the provision applying the wholesale rate to sales "to manufacturers only, of machinery, machine parts, and supplies which are exclusive necessities to processing within this state" was not shown to be applicable to taxpayer because the facts showed that not one in seven saw mills in this state used the device and such device was not "an exclusive necessity." On suggestion of error the court retracted its former opinion and held that the test of "exclusive necessity" was met if the primary purpose of the instrument was for processing within this state, and that the number of users of the device was not determinative of this question. Thus, the primary purpose test is established in this field. However, the suggestion of error was sustained only by the fact that the court was equally divided on the question, and the holding of the lower court for the taxpayer was allowed to stand.

In *M. L. Virden Lumber Company, Inc. v. Stone*[6] it was held that a retail and wholesale lumber dealer who had sold three lots was not liable for a sales tax on the sale, since such sales were merely incidental to its

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[4]202 Miss. 670, 29 So.2d 290 (1947).
[5]204 Miss. 790, 36 So.2d 137 (1948), *suggestion of error sustained,* 37 So.2d 779 (1948).
[6]203 Miss. 251, 33 So.2d 841 (1948); 39 So.2d 498 (Miss. 1949).

main business of selling building materials. However, a contractor, who was forced by certain FHA requirements to buy lots on which he constructed houses and then to sell them, was held to be liable for the sales tax, although his business had been up to that time that of a contractor only, the court stating that the contractor in such an event had changed his business.[7] And in *Holcomb and Longino, Inc. v. Stone*[8] it was said that a real estate firm regularly selling property on a commission basis only was liable for sales tax on the sale of eight lots owned by it as an advertising and publicity scheme, although no profit was made on these sales.

Use Tax

An important decision with regard to the use tax was rendered in *Reichman-Crosby Company v. Stone*.[9] Sections 10146 to 10167 of the Code of 1942 were involved. They provide that a use tax shall be levied on sales made to users in this state and that every person maintaining a place of business in this state shall collect the tax and pay same to the state. The statute further provides that "the term 'retailer maintaining a place of business in this state' shall mean and include any retailer, distributor . . . having or maintaining within this state an office, warehouse . . . or any agent operating within this state under the authority of the retailer . . . irrespective of whether such place of business or agent is located within this state permanently or temporarily . . ." The taxpayer was located at Memphis, Tennessee. Traveling salesmen, having their homes in Memphis, traveled into Mississippi soliciting orders which were sent to the office in Memphis for acceptance, and shipment was made from Memphis in interstate commerce. The court held that the state is without constitutional authority to impose upon such vendors the duty of collecting such a tax since there was no jurisdiction over the taxpayer. The court distinguished *General Trading Company v. Tax Commission*[10] which upheld the constitutionality of an Iowa statute having almost identical wording as applied to identical facts. The basis of the distinction was the Supreme Court of Iowa had held that such a non-resident vendor was "doing business" in the state of Iowa, thus giving the necessary jurisdiction to tax, but that the Mississippi court had never so held and would not so hold; and therefore, the jurisdiction to tax, which is necessary, was not in Mississippi. Two judges dissented on the ground that the statute defined the activity of taxpayer as "doing business" in this state, whereas previous decisions of our court holding such activities not to constitute

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[7]Harry D. Kantor & Son v. Stone, 203 Miss. 260, 34 So.2d 492 (1948).
[8]34 So.2d 491 (Miss. 1948).
[9]204 Miss. 122, 37 So.2d 22 (1948).
[10]322 U.S. 335 (1944).

doing business in this state were based on general law and not on statutory construction or definition. This decision is important in view of the fact that the more recent sales tax acts of other states impose a varied galaxy of duties on non-resident vendors, and it would seem that under this decision our legislature would not be permitted to impose similar duties on this sort of taxpayer.

Interstate Oil Pipe Line Company v. Stone[11] involved both the sales tax and use tax statutes. Taxpayer was a pipe line company which gathered oil from storage tanks within the state and delivered it to railroads within the state for shipment in interstate commerce. It was held that Code Sections 10105 and 10109 imposing a privilege tax measured by gross receipts applied, since the business was local and the interstate journey did not begin until loaded into tank cars of the railroad. By way of dictum the court stated that under *Stone v. Memphis Natural Gas Company,*[12] the tax may be imposed even if it be conceded that the business of taxpayer constituted interstate commerce.

Taxpayers also purchased from non-resident vendors materials which partly were used on an interstate pipe line and partly on the "local" pipe line activity, when such materials could not be bought from manufacturers or dealers in the state, but when there were salesmen within the state who could take orders for the materials for shipment from non-resident vendors. The court first held that Code Section 10149 exempted such purchases, since the fact that salesmen were within the state who could take orders for shipment from non-resident vendors did not make such materials procurable in the ordinary channels of trade in this state and, secondly, on the ground that this section exempted property used in the furtherance of interstate transportation. On suggestion of error[13] the court withdrew the first ground of its former decision on the use tax question and based its holding entirely on the exemption offered by the use of materials in furtherance of interstate transportation.

Property Assessments and Taxes

In *State v. Rogers*[14] it was held that the state tax collector did not have authority to bring suits to cancel void tax sales. The authority of the collector was limited by Code Section 6986. And in *Bailey v. Emmich Brothers*[15] it was held that under the above section the collector had no authority to collect taxes where no assessment had been made or where

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[11]203 Miss. 715, 35 So.2d 73 (1948).
[12]*Supra* note 3.
[13]*Overruled,* 203 Miss. 715, 36 So.2d 142 (1948).
[14]39 So.2d 533 (Miss. 1949).
[15]204 Miss. 666, 37 So.2d 797 (1948).

an inadequate assessment had been made, such authority being limited to collecting unpaid taxes which were due.

In *Buchanan v. Red Banks Creek Drainage District*[16] it was held that where only one portion of a canal in a drainage district needed repair and maintenance, an additional assessment against all owners in the district could be made to provide funds for such repairs. On the other hand, in *Hall v. Brown's Creek Sub-Drainage District No. 1*,[17] the court said that an assessment could not be made against persons within a sub-drainage district only where a part of the funds were to be used outside the sub-district but within the parent district.

In *Tardo v. Sterling*[18] it was held that Code Section 9923 did not require a municipality to sell land for taxes on the first Monday in April, but that the statute allowed the sale either on that day or on the third Monday in September. *Ellard v. Logan*[19] held a tax sale void which was made on the first Monday of September when the statute required that it be made on the third Monday of that month.

In *State v. Southern Pine Company*[20] the constitutionality of Code Section 4073 was upheld. This section allows the state land commissioner to strike from his rolls lands sold to the state for taxes where the sale was void. Where the land commissioner had done so, he acted in accordance with a constitutional statute, and the state no longer had any interest in such land which would constitute a cloud upon the title. Hence no suit could be maintained against the state to cancel a non-existent cloud upon the title.

The hearing of objections to an assessment roll is not required to be set on the first Monday in August, the first day of the August meeting of the board of supervisors, where the board of supervisors stayed in session until July 27th and gave 10 days' notice that the hearing of objections would begin on August 6th, since the required 10 days' notice was given.[21] But *Berryhill v. Johnston*[22] held a tax sale void where the order for the approval of the assessment roll did not affirmatively state that notice had been published to the effect that the assessment rolls had been equalized at the July meeting of the supervisors and were ready for examination and inspection.

Under the theory that statutes allowing redemption of land from sales for taxes should be construed liberally in favor of the owner, the court

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[16] 39 So.2d 321 (Miss. 1949).
[17] 41 So.2d 46 (Miss. 1949).
[18] 38 So.2d 911 (Miss. 1949).
[19] 39 So.2d 455 (Miss. 1949).
[20] 38 So.2d 422 (Miss. 1949).
[21] 39 So.2d 317 (Miss. 1949).
[22] 39 So.2d 530 (Miss. 1949).

held in *James v. Tax Investment Company*[23] that where an owner had sufficient money on his person to pay for all back taxes and offered to redeem the property, such offer constituted an offer to redeem the property from all past sales and took away the power of taxing authorities to convey title to anyone else.

The court defined the type of fraud necessary to void a state land patent in *State v. Cummings,*[24] stating that actual fraud, an intention to deceive, coupled with a deliberate, fraudulent purpose to injure and deceive the party complaining, was the type of fraud contemplated by Code Section 1322.

The separate assessment of mineral interests was the question in several decisions during the past two years. The recent decisions should be read and studied in the light of and along with prior decisions of the court on the questions involved.[25] As a preliminary it should be stated that Code Section 9772 provides for the assessment of land to the owner with notations of other persons claiming ownership therein, but that only one tax thereon shall be collected. Section 9769 states that it shall be the duty of the tax assessor to assess all lands and he shall require owners or agents to render a list of all lands owned, and that all persons owning lands shall deliver to the tax assessor on demand a list of such lands. These two sections describe by whom and upon what information land is to be assessed. Section 9770 was enacted many years later. This section provides that interests separately owned from the surface shall be assessed and taxed separately from the surface, but in the same manner as theretofore existed with regard to land. It would seem that by the latter section, leasehold interests, oil, gas and timber, as well as other interests were not only made capable of separate assessment, but were required to be separately assessed. Further, it would seem that the duty was on the tax assessor to assess the separate interests, just as it is his duty to assess separate parcels of surface land. If an assessor had not assessed a tract of land, no valid sale for taxes could be made, but back assessment could be made. This latter statute would seem to mean that after its enactment if separately owned interests had not been assessed separately, there could be no sale of such interest, but there might be back assessment. However, it was decided by *Stern v. Parker*[26] that where the separate owner of a mineral interest had not had such interest separately assessed, an assessment of the surface included this interest, and a sale of such assessment passed title to such separate interest to the purchaser of the surface at the

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[23]40 So.2d 539 (Miss. 1949).
[24]203 Miss. 583, 35 So.2d 636 (1948).
[25]Wade, *Recent Oil and Gas Cases,* 18 Miss. L. J. 243 (1947).
[26]200 Miss. 27, 25 So.2d 787 (1946), *suggestion of error overruled,* 27 So.2d 402 (Miss. 1946).

tax sale. The general rule is that a purchaser at a tax sale does not acquire any rights by virtue of being a bona fide purchaser, but acquires the property with its infirmities.

With this brief background, we come to the recent decisions. The first case was *McNatt v. Hyman.*[27] The separate owner of a mineral interest requested the assessor to separately assess such interest, which request was refused. Request was made of the chancery clerk who referred taxpayer to the sheriff. The sheriff noted on his assessment rolls, in the space where the surface was described, the letters, "M.R." and collected a tax. It is not clear just what else the sheriff did but he did collect the tax on his assessment. Later, the property described by the surface description was sold for taxes. The question presented was whether this sale carried with it the minerals. At first the court held that it did, saying that to hold otherwise would allow two taxes to be collected on the same property in violation of Section 9772, and further because the sheriff had no authority to make the assessment since the original assessment included within it the minerals. However, on suggestion of error[28] the court reversed itself and held that Section 9772 did not prevent the separate assessment from being made, but on the contrary Section 9770 required that it be made. As a result, the minerals were unassessed property at the time the request to the sheriff was made, and it was within his authority to make the assessment. Therefore, under these circumstances, *Stern v. Parker* did not apply, and the sale of the surface did not pass title to the minerals. The court distinguished *Stern v. Parker* on the ground that in that case the taxpayer had not attempted to have his separate interest separately assessed.

Then came *Hendrix v. Foote*[29] which first held that Section 9770 did not authorize the separate assessment of a fractional mineral interest. However, on suggestion of error[30] the former decision was overruled and it was held that a separate assessment of a fractional interest in separately owned minerals was not only permitted but was required by Section 9770. Therefore, a sale for taxes of such separately assessed interest was valid and passed title to such interest to the purchaser. The court stated that Section 9772 did not mean that only one tax may be collected on one tract of land which had been split into different interests, but that Section 9770 made these varied interests the type of interests which could be assessed separately as land was under Section 9772.

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[27]204 Miss. 824, 38 So.2d 161 (1948).
[28]*Sustained,* 204 Miss. 824, 38 So.2d 107 (1948).
[29]36 So.2d 145 (Miss. 1948).
[30]38 So.2d 111 (Miss. 1948).

Bailey v. Federal Land Bank of New Orleans[31] then came up for decision. *Smith County Oil Company v. Board of Supervisors of Simpson County*[32] had held that an oil and gas royalty interest in non-producing property could not be the subject of ad valorem taxation. In reliance upon this decision, taxpayer had withdrawn its assessment upon its undivided oil, gas and mineral interests under lease, and such interests were not assessed. The surface rights and other undivided oil, gas and mineral interests were assessed and placed on the roll without excepting from the description thereof the mineral interests of the taxpayer and the lease thereon. Thereafter, a back assessment was made against this interest of taxpayer. Taxpayer denied liability on the ground that under *Stern v. Parker,* its interest was included in the assessment of the surface owner and other mineral holders, and the tax thereon had been paid. The court held, however, that even in this situation *Stern v. Parker* did not apply, stating that the interest of taxpayer was of a type subject to ad valorem taxation, and Section 9770 required that the separate assessment be made.

The only factual difference between the above case and *Stern v. Parker* is that in the latter case the property had sold for taxes and in this case there had been no sale. It would seem that if the purchaser at a tax sale takes the property with its infirmities, then the result of two identical situations should not be altered by the fact that there was a tax sale. In other words, the same legal consequences should result from the payment of a tax on an assessment, as result from a tax sale. And if that be so, then either *Stern v. Parker* or the *Federal Land Bank* case is incorrectly decided. The *Federal Land Bank* case is consistent with the decisions of the court after *Stern v. Parker* in that in all these cases the decision is based upon a holding that separate interests and fractional interests in minerals are the proper subject of ad valorem taxation separate and apart from the surface and that Section 9770 requires that they be separately assessed. The original theory behind *Stern v. Parker* is inconsistent with the theory evolved by the later cases. This is shown by the fact that in each of the later cases the court has been forced to distinguish *Stern v. Parker.* In fact, the opinion on suggestion of error in *Stern v. Parker* changed the plain meaning of Sections 9769, 9770 and 9772 when the duty of assessing property or separate interests was said to be on the taxpayer and not on the assessor. *Stern v. Parker* was decided shortly after *Smith County Oil Company v. Board of Supervisors of Smith County*[33] which was expressly overruled by the *Federal Land Bank* case. It is submitted that the *Federal Land Bank* case was correctly decided and

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[31]40 So.2d 173 (Miss. 1949).

[32]200 Miss. 18, 25 So.2d 457 (1946), *suggestion of error overruled,* 26 So.2d 685 (Miss. 1946).

[33]*Supra* note 32.

that the decision in *Stern v. Parker* was incorrect as giving too great an effect to a tax sale.

The last case in this field decided by the court at this writing presents another problem. In *State v. Cummings*[34] a surface owner reserved a portion of the minerals while conveying a part thereof. He had had the reserved mineral interest separately assessed and paid the taxes thereon. He then sued to recover the taxes paid on the reserved minerals, relying upon the decision in *Stern v. Parker* to the effect that an assessment of the surface carried with it the assessment of the minerals and that when he paid the taxes on the surface he thereby paid the taxes on the minerals. The court held that *Stern v. Parker* did not apply since in this case the taxpayer had a separate assessment for the royalties on the next line in the roll, which fact was sufficient to constitute an implied exception to the description of the surface which was assessed to him. The point was also stressed that in this case the interest was in a producing mineral interest, while *Stern v. Parker* was concerned with a non-producing interest. The *Smith County Oil Company* case was also relied on by the taxpayer, but the court pointed out that the recently decided *Federal Land Bank* case had overruled that case.

This decision brings up another problem. It has not been decided yet that a reserved mineral interest in non-producing property may be the subject of separate assessment. Assuming that it is, what is the effect of the *Cummings* case?[35] Strong reliance was placed upon the fact that there was no value of the reserved mineral interest taken into account in the surface assessment because of the implied exception represented by the separate assessment. Assume a case where the facts showed that no value of a reserved mineral interest was taken into account in assessing the surface, and there has been no sale of the surface for taxes. Query: Is there authority for back assessing the reserved mineral interest in view of the interpretations put upon Code Sections 9767, 9770 and 9772?

Public Law

Constitutional Law

Craig v. North Mississippi Community Hospital[36] upheld the constitutionality of Chapter 430, Laws of 1948, as not violative of the provision against donations to private institutions, individuals or corporations and as not violative of the provision against the credit of the state being loaned or pledged for any individual, or the assumption by the state of a private

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[34] 40 So.2d 587 (Miss. 1949).
[35] *Supra* note 34.
[36] 39 So.2d 523 (Miss. 1949).

obligation. This statute allows certain donations by the state to be made to private hospitals which are "charitable institutions" and which comply with supervisory requirements set forth in the statute.

In *Stepp v. State*[37] it was held that a person under the Constitution of 1890 did not now have the right to possess intoxicating liquors, although at the time of the adoption of the constitution a person had that right. The court adopted the familiar pattern of interpreting constitutional questions on the basis of a flexible constitution, which changes with changing conditions and customs.

State v. Sanders[38] said that although the state or political subdivision cannot be sued without express statutory consent, yet an officer or agent of the state may be sued when the relief applied for requires no affirmative official action nor the affirmative discharge of any obligation of the state.

County Affairs

Miles v. Board of Supervisors of Scott County[39] held that the general election laws applied to an election to determine the question of whether beer and wine shall be excluded from a county, and that proceedings of a board of supervisors determining whether the requisite number of qualified electors had signed the petition for such election were judicial proceedings under Section 24 of the Mississippi Constitution. Thus, where such proceedings were closed to the public any determination made therein was void. Code Section 10208 provides for an election as to this question, but states that no election shall be held oftener than once in five years. It was held in *Caruthers v. Panola County*[40] that for the election to be valid the order of the board need not affirmatively recite that no such election had been held within five years. The notice of such an election was attacked in *Henry v. Board of Supervisors of Newton County.*[41] The court there held that the notice was sufficient where it was given by publication in a newspaper and by an announcement posted on the bulletin board at the courthouse, both stating that the question to be voted on was whether to prohibit the transportation, etc., of beer and wine in the county, and both setting the date for voting.

Koonce v. Board of Supervisors of Grenada County[42] held that it was the duty of the board to contest a suit to reform a conveyance by it of

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[37]202 Miss. 725, 32 So.2d 447 (1947), *suggestion of error overruled,* 33 So.2d 307 (Miss. 1948).
[38]203 Miss. 725, 35 So.2d 529 (1947).
[39]33 So.2d 810 (Miss. 1949).
[40]38 So.2d 902 (Miss. 1949).
[41]203 Miss. 780, 34 So.2d 232 (1948), *suggestion of error overruled,* 35 So.2d 317 (Miss. 1948).
[42]202 Miss. 473, 32 So.2d 264 (1947), *suggestion of error overruled,* 32 So.2d 456 (Miss. 1947).

timber to an individual for too low a purchase price, since the low price in this case amounted to a violation of the constitution in that it was a donation to an individual.

Chapter 422 of the Laws of 1946 states that the board of supervisors may allocate funds for deposit in banks meeting certain tests. *Leflore Bank and Trust Company v. Leflore County*[43] held that under this statute the board was not required to divide the funds for deposit with all banks in the county qualifying, but may place all county funds in one bank.

In *Mullinax v. Trustees of D'Iberville Consolidated School*[44] the court held that the trustees of such a school were not liable for breach of contract in a suit by a teacher for refusing to allow her to teach, where it was not alleged that such refusal amounted to tortious conduct, such as that their action was actuated by malice or ill will.

The court decided several cases relating to issuance of bonds by a board of supervisors. In *Nichols v. Calhoun*[45] it was held that Code Section 6416 authorized the issuance of school bonds for the purpose of building a new stadium and athletic field in connection with a school building, the court stating that a stadium and athletic field was a school within the meaning of the statute. Where an election had been called and held, and the results authorized the issuance of bonds for the construction of a community hospital, under Chapter 277, Laws of 1944, as amended, it was held that mandamus would lie to compel the issuance of the bonds, the court saying that such an election was held for the purpose of issuing the bonds and was not a mere plebiscite to test public sentiment.[46] But mandamus will not lie to compel adjudication of jurisdictional facts for the issuance of bonds, since such adjudication is a judicial function, and the proper remedy is appeal to the circuit court.[47]

Sections 4341 and 4342 of the Code of 1942, pertaining to the issuance of bonds of school districts, including "specified area school districts," and prescribing their issuance upon an election, also provides that "all other provisions of law as to the issuance of bonds shall apply to the issuance" of school district bonds. Code Section 6370 authorized the Board of Supervisors to issue bonds of "consolidated school districts" without an election where a majority of the qualified electors of such district have petitioned for the issuance thereof. The court in *Ashcraft v. Board of Supervisors of Hinds County*[48] added to these words the phrase

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[43]202 Miss. 552, 32 So.2d 144 (1947).
[44]204 Miss. 693, 38 So.2d 93 (1948).
[45]204 Miss. 291, 37 So.2d 313 (1948).
[46]Board of Supervisors of Calhoun County v. State *ex rel* Patterson, 40 So.2d 273 (Miss. 1949).
[47]Board of Supervisors v. State *ex rel Crisler,* 204 Miss. 479, 38 So.2d 314 (1949).
[48]204 Miss. 65, 36 So.2d 820 (1948).

"specified area school district," and held that where the majority of the qualified electors of such a district had petitioned for issuance of such bonds, they may be issued without an election.

Municipal Affairs

Coleman v. Lucas[49] held that where the requirements of Code Section 3774 were met for the recall of municipal officials at a special election to determine that question, the circuit court could not call the election when the officials refused to do so, since Sections 3775 and 3776 specify that in that event the petition shall be presented to the governor who shall call the election, which is an exclusive remedy.

Columbus v. McIlwain[50] decided that even if a municipality was negligent in maintaining fire hydrants, and the water used for fire extinguishing came from the municipal water works which were not operated in its governmental capacity, such municipality is not liable for damages as a result of such negligence, because as to the extinguishment of fires the municipality is engaged in its governmental capacity, the negligent execution of which does not render a municipality liable in tort.

Municipalities in the past few years have experienced growing pains. Expansion ordinances have brought three cases to the supreme court recently. *Walker v. Town of Waynesboro*[51] held that the burden of proof of unreasonableness of an expansion ordinance was on the objectors, and that evidence of probability of benefit to old and new citizens by the expansion is sufficient to sustain a verdict for expansion. In *Vail v. City of Jackson*[52] it was said that an ordinance of expansion passed within one year after the passage of an ordinance for expansion which was found unreasonable was not void under Code Section 3379, which prevents the passage of an ordinance for expansion within one year, since that section only prevents the passage within one year of an ordinance expanding the limits within the same or similar boundaries as the previous ordinance held unreasonable. In *Kennedy v. City of Kosciusko,*[53] upholding the expansion of the limits of Kosciusko, it was stated by way of dictum that the question of taxes, when properly in evidence and before the jury, may be considered with other factors on the issuance of the reasonableness of an expansion ordinance.

Eminent Domain

A municipality must specify the location of property which it seeks to take for a contemplated municipally operated parking facility under

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[49] 39 So.2d 879 (Miss. 1949).
[50] 38 So.2d 921 (Miss. 1949).
[51] 202 Miss. 830, 32 So.2d 455 (1947).
[52] 41 So.2d 357 (Miss. 1949).
[53] 203 Miss. 4, 33 So.2d 285 (1948).

Chapter 414, Laws of 1946. Also, the ordinance adopting the location must be adopted by all three members of the council under this statute.[54]

The question of what sort of interest in property a condemning authority acquires has been considered several times in the past two years. In *Nicholson v. Board of Mississippi Levee Commissioners*[55] it was held that the levee commission in a condemnation proceeding acquired only a right of way for levee purposes. Therefore timber on the lands was the property of the owner of the fee. In *Whitworth v. Mississippi State Highway Commission*[56] it was held that the highway commission was authorized to acquire only a right of way interest by way of eminent domain, and that as a result such an interest is all that could be acquired by way of deed. Hence, even though the deed recites the conveyance of a fee interest, only a right of way interest is acquired. Code Section 8023 and 8038 were involved. Chapter 332, Laws of 1948 repealed these sections and now authorize the highway commission to take whatever interest it deems necessary.

Normally, where the highway commission has made a determination of what land to take, the question of whether there exists other lands for the purpose cannot be raised. However, Code Section 2782 permits the use of a writ of prohibition to test (1) whether the condemnor is such a legal entity as is entitled to exercise that right, and (2) whether there is a public necessity for the taking of the particular property involved. In *Mississippi State Highway Commission v. Cockrell*[57] it was held that a writ of prohibition should be granted to test the question of necessity of taking a particular parcel of land, but that that question should be decided by the circuit judge and not by a jury. And in *Natchez v. Henderson*[58] it was held that in a proceeding for a writ of prohibition in which the trial judge had made a finding that the necessity for the taking existed, he could not thereafter grant the writ on the ground that other lands were available.

Section 17 of the Mississippi Constitution provides that "private property shall not be taken or damaged for public use, except on due compensation being first made." The measure of damages to the owner has been held in many cases to be the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking.[59] This case held that

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[54]City of Jackson v. Craft, 36 So.2d 149 (Miss. 1948).

[55]203 Miss. 71, 33 So.2d 604 (1948); Board of Mississippi Levee Commissioners v. Roberts, 34 So.2d 679 (Miss. 1948).

[56]203 Miss. 94, 33 So.2d 612 (1948).

[57]39 So.2d 494 (Miss. 1949).

[58]41 So.2d 41 (Miss. 1949).

[59]Mississippi State Highway Commission v. Dodson, 203 Miss. 10, 33 So.2d 287 (1948); Mississippi State Highway Commission v. Loper, 33 So.2d 288 (Miss. 1948); Mississippi State Highway Commission v. Smith, 202 Miss. 488, 32 So.2d 268 (1947).

in arriving at the difference in value witnesses had the right to consider the inconvenience caused to the whole tract of land because of the highway, since this fact would probably be considered by a would-be purchaser. But the damages resulting to the present owner could not be considered since that would not necessarily affect the actual value. These cases illustrate the fact that the objective rather than the subjective test as to difference in value before and after the taking must be used.

Two cases have been decided on the question of damages where there was no taking of any land. In *Water Valley v. Poteete*[60] it was held that where a municipality changes the grade of a street, causing damage to an abutting land owner, such damage constituted "damage" within Section 17 of the Constitution, and the owner was entitled to compensation therefor. However, the remedy for this was a suit for damages, a legal remedy, and injunction would not lie.

Baker v. Mississippi State Highway Commission[61] settled many conflicting decisions in this state on the measure of damages where there is no taking of land by the condemning authority. In this case the highway commission caused the highway to be raised 19 to 26 inches in front of Baker's land which abutted on the highway 230 feet. Baker had a gasoline service station, repair shop, grease rack and pit, and warehouse on this property. The raising of the highway rendered it difficult and hazardous for motorists to drive from the highway to trade with him. Baker offered evidence at the trial that the costs to him to raise his lot and to make improvements to remedy the situation were $4,500 actually expended, and that it would cost $3,000 more for completion. These items were undisputed. The jury returned a verdict for $1,500 from which an appeal was taken. There was no evidence in the record as to the comparative value test. The court held that it would not disturb the verdict of the jury since no evidence of the comparative value test was introduced. In making this holding many of the past decisions in this state were reviewed, some of which held that "the owner should be made whole," or that he is "entitled to compensation for his damages," damages to be the "market value diminished," and some the damages computed on the difference of market value test. The court outlined what it terms the "true rules" to be used in determining damages. Three judges agreed that past decisions were in a state of confusion. Three of the judges desired to reverse the case because a patent injustice had been done, but the other three pointed out that the landowner obtained the instructions it requested, and because upon being informed that there was no evidence on the before and after value of the property, the landowner did not offer evidence on this point. Thus the

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[60]203 Miss. 382, 33 So.2d 794 (1948).
[61]204 Miss. 166, 37 So.2d 169 (1948).

verdict of the jury was allowed to stand. The court stated that in all such cases evidence of the cost of repairs remedying the situation were admissible, but could not be made the separate, independent foundation of a verdict, being admissible only for consideration of the difference in value test.

Administrative Law

In *White v. National Old Line Insurance Company*[62] the court upheld an order of the insurance commissioner for the insurance company to revise certain clauses of its contract, stating that the commissioner is given wide latitude in exercising his authority to protect the public, although such exercise must not be arbitrary. In *H & L Delivery Service v. Mississippi Public Service Commission*[63] it was again held that a decision by an administrative agency on a question of fact will not be disturbed by the courts unless "manifestly wrong."

An administrative agency cannot order that a thing be done which is impossible of performance and which does not provide for future contingencies. In *State v. Hinds*[64] the state plant board had ordered appellee to state in its contract with homeowners that termites would be completely eradicated. This order was held void in that it was shown that there could never be certainty that termites were completely removed, and the order did not allow for this nor for the contingency that termites might attack the structure subsequent to treatment.

The authority of a licensing board is strictly construed. In *Mississippi State Board of Veterinary Examiners v. Watkins,*[65] Code Section 8914 and sections following, of the Code of 1942 were involved. They provided that the board may issue a license to a veterinarian who has (1) practiced ten years and (2) furnished proof of good moral character. The board found these things to exist, but refused to issue the license on the ground that the previous practice was unlawful because done without an earlier license. The court held that it was not within the authority of the board, under the statute, to refuse to issue the license.

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[62] 203 Miss. 752, 34 So.2d 234 (1948).
[63] 35 So.2d 713 (Miss. 1948).
[64] 33 So.2d 317 (Miss. 1948).
[65] 40 So.2d 153 (Miss. 1949).

VIII

REAL PROPERTY

*Walter R. Bridgforth**

Adverse Possession and Prescription[1]

Foster v. Jefferson County.[2] Appellants and their predecessors in title had been in the actual adverse possession of certain school lands for more than 50 years under recorded deeds purporting to convey the lands in fee simple. The court held that Section 6596, Code of 1942, sometimes referred to as the 25-year statute of limitations concerning school lands, applied to cure defects in the procedures of the School Directors and Board of Trustees of Jefferson County, Mississippi, who, proceeding under Sections 2015 to 2019 inclusive, Code of 1871, had deeded in fee simple to the predecessors in title of appellants certain sixteenth section lands in said county.

In attempting to show the existence of a 99-year leasehold executed prior to the date of said deeds, the appellee county argued that because of the long passage of time a presumption arose that the alleged ancient lessee had paid the notes, which were the consideration for his proposed lease, and had gone into possession of the lands in question, thereby becoming entitled to the lease. The court stated that if the ancient lessee had " . . . gone into possession or had otherwise exercised any substantial rights over the land, a presumption of payment would arise by the long lapse of time. There is no presumption that a purchaser has gone into possession . . . ". The court found that the evidence did not show the execution of the alleged lease, nor did the evidence show an assumption of possession by the ancient lessee under such lease.

In the case of *Rosenbaum v. Bohannon*[3] the decision of the court in the *Foster* case, as to the presumption of payment of purchase money, was cited as controlling authority. In the *Rosenbaum* case, Mary Bohannon and others, claiming as the sole heirs of John Bohannon, brought suit to cancel as a cloud on their title the claim of Leonard Rosenbaum. Proof disclosed that John Bohannon purchased the lands in question October 8, 1896, from C. Rosenbaum, the owner. No deed was found, but a receipt

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[1]Topics related to real property but excluded as being more properly considered under other subjects of this review: Injury to real property, reformation of instruments, specific performance of contracts for the conveyance of land, and eminent domain.

[2]202 Miss. 629, 32 So.2d 126 (1947). Cases are considered under each subheading in order of their decision, save where the subject matter indicated cases should be considered together.

[3]204 Miss. 9, 36 So.2d 798 (1948).

evidencing payment of nearly one-half the purchase price, signed by C. Rosenbaum, was found among the papers of John Bohannon after his death in 1944. The proof showed that following the attempted purchase in 1896, John Bohannon entered upon the land, built his home thereon, enclosed the land with fences, and remained, together with his successors in title, in the actual adverse possesion of the property for more than 45 years. Against this claim of adverse possession, appellant Rosenbaum urged that a vendee under an executory contract of sale, whether written or oral, enters into possession of land under and without hostility to his vendor, and that therefore the vendee's possession is not adverse without proof of notice to the seller of the sole claim of ownership sought to be asserted. The court answered this proposition by stating:

> . . . however, the court in effect held in the case of *Foster v. Jefferson County, Mississippi* . . . that where a purchaser of land on credit has gone into possession and has exercised exclusive acts of ownership and control over the same for such a long period of years, there is a presumption of payment.

Jones v. Gulf Refining Company.[4] The opinion of the court follows the *Foster case.* Here a predecessor in title to appellant Jones had secured title to certain school lands through the execution and delivery by S. Gwinn, the Auditor of Public Accounts, on July 4, 1881, of a forfeited tax land patent conveying a fee simple title in said lands. The patent recited that the land was sold on May 10, 1875, for taxes due the state. Predecessors in title of appellant Jones were shown to have been in the actual adverse possession of these lands from date of the forfeited tax land patent, a period of more than 60 years. There was no record that fee simple title to said school lands had passed out of the state into a private individual prior to January 1, 1874, a happening which would have been necessary in order that the land in fee might be subject to taxation and sale on May 10, 1875. The court, following its holding in *Foster v. Jefferson County,* found a presumption existing that there was such a grant by the sovereign as would support the title of appellant Jones and of his predecessors, who had been in possession of the lands for more than 25 years. The court pointedly based its decision upon Code Section 6596 which existed in the Code of 1892 as Section 4148. The court also made the point that under the Code of 1871, the sovereign might have parted with a fee simple title to the lands in question. On suggestion of error, the court buttressed its position by an opinion[5] holding that in favor of long possession almost every variety of written evidence of title will be

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[4]202 Miss. 705, 32 So.2d 435 (1948).
[5]202 Miss. 705, 34 So.2d 735 (1948).

presumed, and effective links in a chain of title will be supplied by presumption and the title declared perfect where possession has been continued for a great length of time without interruption.

Davis v. Gulf Refining Company[6] involved an attempt by a co-tenant, claiming an undivided one-sixth interest in certain valuable oil producing lands, to assert his claim in the year 1945 against owners whose predecessors in title had been in the actual adverse possession of the property since the year 1931, claiming under a warranty deed purporting to convey the entire estate. The deed was executed by all of the co-tenants save the complainant. The court found that the execution and recording of the warranty deed of complainant's co-tenants to a stranger to the title in the year 1931, set in motion an adverse claim against the complainant which was thereupon made available to the grantee of the deed in 1931, who, by implementing this claim by actual adverse possession through himself and his successors in title for a period beyond the statutory limitation, matured the disseisin into complete ownership. This decision, leaving aside the comments of the supreme court on the circumstances which had led the trial court to also find complainant guilty of laches and subject to an estoppel, seems a clear-cut affirmance of the position of the court enunciated in *Eastman-Gardiner Company v. Hinton.*[7]

McDonald v. Roberson.[8] There is cited in the *Davis* case, along with the *Eastman-Gardiner Company* and other cases, as authority for the decision of the court, the case of *Peeples v. Boykin.*[9] It is interesting to note the pointed questioning by the supreme court of the *Peeples* case in *McDonald v. Roberson.* In the latter case one had been in the actual adverse possession of property for many years beyond the statutory period, claiming under color of a void recorded deed which attempted to convey the property to the party in possession. The court found that where possession had continued under color of title with claim of right as against all parties and with knowledge of claimant's brothers and sisters who might have stood upon their record title as co-tenants, claimant had acquired an unassailable title through adverse possession. In its opinion, the court said:

> In *Peeples v. Boykin* . . . this court held that where a person who would otherwise be a tenant in common remained in exclusive and continuous possession, claiming to be the owner under a recorded deed purporting to convey the entire interest in the property, the title would mature in such occupant on the expira-

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[6]202 Miss. 808, 32 So.2d 133 (1948), *suggestion of error overruled,* 202 Miss. 808, 34 So.2d 731 (1948).
[7]86 Miss. 604, 38 So. 779 (1905).
[8]204 Miss. 737, 38 So.2d 189 (1948).
[9]132 Miss. 359, 96 So. 177 (1923).

> tion of ten years from the date of the recordation of the deed, even though the deed in severalty was made by other tenants in common and there was no visible change in the character of the occupancy after the recordation of the deed, and no actual notice was given by the occupants—the theory being that when the deed was recorded, that fact, coupled with the occupancy under it, gave rise immediately to a cause of action to the co-tenants whose interest had not been conveyed.

The court further stated:

> The soundness of the opinion in *Peeples v. Boykin* has frequently been questioned and we mentioned it in order to disclose that we do not base our present decision upon it; . . . .

Cotten v. Cotten.[10] Leaving aside the procedural questions, this case is of interest because of the holding that though parties may acquire property through adverse possession, such parties may lose title to their lands by permitting the lands to be sold for taxes when described on the assessment roll as a part of an adjoining tract not owned or claimed by them.

New Orleans and Northeastern Railroad v. Morrison.[11] The railroad company was not allowed to assert claim to a fee simple title in its right-of-way through adverse possession where the railroad had acquired by deed only a right-of-way easement. The court pointed out that under such circumstances the exclusive use of the surface was consistent with the railroad's mere right-of-way, and that the railroad's permissive user of the surface was inconsistent with the acquisition of prescriptive rights. The court found that there was never any defiance of the land-owner's basic title through the exclusive use exercised by the railroad.

Downing v. Starnes.[12] The defendants had been in actual adverse possession of a portion of the lands for more than ten years, claiming under color of an instrument of record containing the following granting clause: "In consideration of love and affection I convey and warrant at my death . . . " The court stated that regardless of the legal character of the instrument, whether testamentary or otherwise, it was sufficient as color of title. During the period of adverse possession these lands were improperly sold for delinquent taxes. The tax sales were void sales, and the court held that there was therefore no interruption of the continuity of defendant's adverse possession.

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[10]203 Miss. 316, 35 So.2d 61 (1948).
[11]203 Miss. 791, 35 So.2d 68 (1948).
[12]35 So.2d 536 (Miss. 1948).

Kelly v. Wilson.[13] School trustees brought suit to quiet title to the tract of land occupied by "The Five Point Free School." Said trustees had been given a deed to one acre of land, the granting clause of which contained the following phrase: ". . . so long as said land is used for school purposes . . ." The court held that the deed conveyed an estate in "fee simple defeasible" and that the deed did not declare or create any trust in the land. The trustees, depending upon this deed, had gone upon the one-acre tract of land therein conveyed and had gone upon certain adjacent lands, claiming the adjacent lands also by virtue of the deed. The trustees had been in possession of the land conveyed by said deed and in the adverse possession of said adjacent lands for a period of more than ten years. The court held that the record supported the chancellor's finding that the trustees' possession was adverse and under claim of ownership within the limitations of the deed; that therefore the trustees had acquired by adverse possession, subject to the limitations prescribed in the aforementioned deed, the land occupied adjacent to that actually described in the deed.

Jones v. Hoover.[14] This case is of interest as one set down for hearing on plea matter directed to the sole question of adverse possession under the ten-year statute. The plea was sustained after a hearing on the facts, the court finding all the indicia of adverse possession to have been proved, and an actual ouster of parties claiming as co-tenants to have been shown in the proofs and acknowledged in the pleadings of the cause; and further finding the numerous allegations in the bill of complaint insufficient to show the existence of concealed fraud which would have tolled the statute.

Winstead v. Winstead.[15] During a period of time when lands were being held through adverse possession, such lands were sold to the state at a valid tax sale. The court held such tax sale tolled the running of the statute.

Browder v. Graham.[16] The predecessors in title of plaintiff were found to have acquired, through prescription, an easement of passage from lands owned by them across the lands of a third party, thence across the lands of the defendant, to the public road. The court held that a sale to the plaintiff of the dominant tenement carried with it the appurtenant easement previously acquired by prescription. The court stated that, in the establishment of an appurtenant easement to a dominant tenement by

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[13]204 Miss. 56, 36 So.2d 817 (1948).
[14]204 Miss. 345, 37 So.2d 490 (1948).
[15]204 Miss. 787, 38 So.2d 118 (1948).
[16]204 Miss. 773, 38 So.2d 188 (1948).

prescription, it is not necessary that all servient tenements be adjacent to the dominant tenement.

Heidelberg v. Duckworth[17] is of interest in that it is an attempt of one claiming by crossbill, adversely to complainant, to establish his claim to lands through the occupancy of complainant's predecessors in title and through the occupancy of complainant, contending that such occupancy was clothed with all the characteristics required by law to exist in adverse possession, and contending such possession inured to his benefit as landlord of complainant and of his predecessor in title. The court held, under facts too complicated to be developed here, that the cross-complainant had not sustained his claim of adverse possession against the complainant.

Webb v. Anderson.[18] In this case appellees successfully defended their forfeited tax land patent title under the two-year statute of limitations, Code Section 717. The case presents one unique feature in that the lands involved were used by third parties as common pasture with the permission of appellees and their predecessors in title. The court found that the permissive use by third parties did not, under the facts of this case, prevent the adverse possession of defendants and their predecessors in title being exclusive. The court found, despite the permissive use by third parties, that the possession of defendant and defendant's predecessors in title was exclusive in recognition of the fact that third parties occupied the lands with permission and as mere licensees.

Ferguson v. Chancellor.[19] In this case the supreme court, reversing the chancellor's finding in the lower court, found that one co-tenant, who became the purchaser of lands in question at a tax sale in 1889, had continued since that date until his death in 1941, a period of 52 years, to hold the lands under exclusive claim of ownership; that his acts in so holding the land under such exclusive claim of ownership were sufficient to indicate to other co-tenants that he did so claim the land; and that his continued adverse occupancy of the land under such claim for that period had, under the facts of this case, constituted an ouster of his co-tenants and ripened a fee simple title to himself and his successors in title.

Pilgrim v. Neshoba County.[20] Appellants unsuccessfully attempted the application of Code Section 6596, sometimes referred to as the 25 year statute of limitations concerning school lands, to secure to themselves a fee simple title in lands which their original predecessors had secured under a 99 year lease, but which certain of their predecessors in title had

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[17] 40 So.2d 179 (Miss. 1949).
[18] 40 So.2d 189 (Miss. 1949).
[19] 40 So.2d 279 (Miss. 1949).
[20] 40 So.2d 598 (Miss. 1949).

thereafter dealt with as lands in fee simple. The evidence clearly showed that appellants' claim of title originated under the 99 year lease. The court denied their claim. Under this state of affairs it would seem that Section 6596, if applicable at all, would lie only to cure defects arising from execution of such 99 year lease.

Randall v. Mitchell.[21] Generally speaking, as between parties sustaining parental and filial relations, the possession of land of one by the other party is presumptively permissive or amicable, but the court held that this presumption may be rebutted by the factual showing of actual adverse possession, as was done in this case.

Title by Estoppel

Peeler v. Hudson.[22] This litigation illustrates one of those rare instances where the owner of an interest in real property is divested of that interest by reason of an estoppel growing out of his acts in relation to another party also interested in the land. One Hudson owned an undivided one-twenty-seventh interest in a certain plantation. A kinsman of Hudson, through correspondence, arranged to purchase what he thought to be an undivided interest formerly owned by Hudson's deceased wife; but, being unfamiliar with the law of descent and distribution in Mississippi, the kinsman was under the impression that the two children owned the entire undivided interest in question. Some years after the two children had executed a conveyance to the kinsman, this transaction having been handled by the said Hudson, and after the kinsman and other parties had conveyed by warranty deed a full fee simple title in all of the lands in interest to appellant, Hudson brought suit for partition of the lands and for an accounting, claiming an undivided one-twenty-seventh interest. The supreme court, in reversing the decree of the Chancery Court of Leake County, found that under the facts and circumstances of this case, Hudson was estopped from claiming his interest in the lands in question, even though he had not conveyed that interest by any instrument of writing.

It is interesting to note that Judge McGehee, specially concurring, pointed out that the decision was:

> in direct conflict with the case of *Gulf Refining Company v. Travis,* . . . and especially with the decision on suggestion of error in that case, . . . both as to what constitutes an estoppel and as to what is required in the Statute of Frauds in order for one to become divested of an interest in realty . . . but I am glad that the doctrine of estoppel is being revived and applied in this

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[21] 41 So.2d 44 (Miss. 1949).
[22] 202 Miss. 837, 32 So.2d 785 (1947).

case and that the *Travis* case is being departed from, since it was not in accord with our previous decisions on what constitutes an estoppel, if the facts therein are to be considered.

Wilson v. Martin.[23] Wilson entered into an oral agreement with the Crumptons to purchase their lands following a title examination which Wilson was securing through his attorney. The title examination disclosed that the lands had been sold for taxes and that title to the lands had matured in the State of Mississippi. Wilson did not inform the Crumptons of this title defect, but prepared a formal application to the state land office in an attempt to purchase the land from the state. When the Crumptons inquired of Wilson concerning their proposed sale, he stated that he was no longer interested in the land and did not intend to buy it. Thereafter, appellee Martin agreed to buy the land if Wilson no longer wanted it. Wilson, on inquiry of Martin, repeated to Martin that he was no longer interested in the land and did not intend to buy it, saying nothing of his application to the state land office. Thereafter, Martin purchased the land by warranty deed from the Crumptons. At the time of these conversations, Wilson had heard nothing from his application to the state land office. After the execution of the deed to Martin, Wilson received a forfeited tax land patent. Claiming under that patent, Wilson brought this suit against Martin to cancel his deed as a cloud on Wilson's title to the land.

As between Wilson and Martin, the court found that a mere statement to a prospective purchaser of land by another prospective purchaser such as Wilson that he, Wilson, did not intend to purchase the land, did not preclude Wilson from purchasing an outstanding title to the land from a party wholly disconnected with the negotiations between the prospective purchaser and the apparent owner—where at the time of the representations neither of such prospective purchasers had any present legal or equitable interest in the land and had at most only an intent to purchase. The court was of the opinion that a statement that the purchaser did not intend to buy was not a statement of past or present fact, for intent may change while present or past facts are fixed. The court, however, distinguished a situation where the statement of intent contained a promise to forego or waive an existing interest or right, which promise was reasonably relied upon by the other prospective purchaser, and would result in injury to that prospective purchaser if that promise to waive were not kept.

Deeds

Silvey v. Upton.[24] Here the court determined the effectiveness of instruments which described lands as follows: ". . . a part of the N½

[23]204 Miss. 196, 37 So.2d 254 (1948).
[24]202 Miss. 485, 32 So.2d 267 (1947).

of SE¼ and a part of the S½ of NE¼ of Section 9, Township 2 N, Range 2 E, and containing 100 acres more or less. . . ." The court said that the descriptions in the instruments were "too vague to sustain their validity," there being no recital or clue which could aid in the identification of the lands.

Smith County Oil Company v. Jefcoat.[25] Jefcoat, appellee, brought suit to remove certain clouds from his title. The case has two aspects. The title to a regular forty-acre tract was involved. As to the north half of that forty acres, appellee and wife claimed through a conveyance from appellee's father, executed for a valuable consideration February 1, 1930. No reservation of mineral rights was made in this conveyance; however, all mineral rights under the land were at the time of this conveyance owned by Eastman-Gardiner and Company. This state of the title was apparent on the face of the records, and appellee admitted that he had actual knowledge at the time of the conveyance that the minerals were in that company. Appellee relied upon the doctrine of after-acquired title to secure to him title to the minerals under said tract. On January 20, 1934, his father and grantor received a quitclaim deed from Eastman-Gardiner and Company conveying the entire forty-acre tract in question. The father paid $1.00 as consideration for this deed and the deed did not reserve or except the minerals. On December 20, 1932, before the execution of the quitclaim deed, Eastman-Gardiner and Company sold to the Smith County Oil Company by an unrecorded deed, unknown to appellee Jefcoat or his grantor, the mineral rights under the entire forty-acre tract. The court said that because Jefcoat purchased the north twenty acres of land with knowledge of the fact that his grantor owned none of the minerals under it, the registry statutes would not protect Jefcoat. Apparently the court referred to the qualification in the statute, "in the absence of actual notice."

As to the second feature of this case, dealing with the south twenty acres, this tract was sold to Jefcoat subsequent to the execution and recordation of the quitclaim deed from Eastman-Gardiner and Company. The purchase by Jefcoat of the south twenty acres was by warranty deed for a valuable consideration and at a time when the records disclosed that Jefcoat would acquire from his grantor a fee simple title not only to the surface rights, but also to the minerals under said south twenty acres. Hence Jefcoat acquired a good title to both the soil and to the minerals under the south twenty-acre tract.

New Orleans and Northeastern Railroad v. Morrison.[26] Suit was brought to quiet titles to minerals under the right-of-way of the railroad.

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[25]203 Miss. 404, 33 So.2d 629 (1948).
[26]203 Miss. 791, 35 So.2d 68 (1948).

The right-of-way was conveyed by appellee's predecessor in title by a deed which quitclaimed "a right-of-way for 200 feet through the following lands. . . ." The court construed the deed to convey an easement rather than title in fee to a strip of land. It supported this interpretation by reference to the recent case of *Whitworth v. Mississippi State Highway Commission*,[27] stating:

> It has been held in such cases that where an easement will satisfy the purpose of the grant a fee will not be included in the grant unless expressly provided.

The court further held that deeds describing lands by a given acreage "more or less," and as lying "east (or west) of the . . . railroad," carried title in fee to the center line of the easement as to subsurface minerals and as to the reversionary surface rights.

Wilburn v. Wilburn.[28] This is an important case on when a deed has been delivered by the grantor and when accepted by the grantee. A father and mother made a deed conveying their homestead, out of love and affection, to their soldier son. The deed was drawn at a time when their son was absent and was reluctant to accept the instrument. Despite that reluctance, the signed deed was delivered to the chancery clerk to be placed on record. Thereafter, and while the deed yet remained of record, but following the destruction of the original deed by the mother, the son returned and went into possession of the property, claiming under the recorded deed. There was a disagreement between son and father; the father brought suit to cancel the deed. The court said the father had not met the burden of proof necessary to show an intention not to effect delivery of the deed; that the circumstances and facts of the case showed the purpose of delivery was effectuated by the release of the properly executed deed to the chancery clerk for recording. As to the acceptance of the deed by the son, the court said, assuming that the son was required to manifest an acceptance, that acceptance would be inferred from the action of the son, upon discovering the recorded deed, claiming and taking possession of the land against the protests of his father.

Judge Griffith, in a concurring opinion, raised the interesting question of how the delivery of a signed deed to the clerk for recording could be withdrawn, where that deed was placed on record before acceptance by the grantee, if indeed that acceptance be necessary. As a matter of public policy, he took the position that a deed so delivered and recorded but not accepted could only be withdrawn through the filing of a suit in the chan-

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[27]203 Miss. 94, 33 So.2d 612 (1948).
[28]204 Miss. 206, 37 So.2d 256 (1948).

cery court and the placing upon the records of a lis pendens notice. He stated that the rule requiring that a deed be accepted to be effective is one for the protection of the grantee. When the grant is entirely beneficial to the grantee, the reason for requiring an affirmative acceptance disappears, and the acceptance will be implied in the absence of a renunciation.

Puryear v. Austin.[29] The supreme court reversed the finding of the chancellor on a question of fact, and set aside a deathbed deed, executed without consideration. The court found that at the time the deed was executed, the deceased party was without mental capacity to understand and appreciate the nature and effect of the transaction.

Mortgages

White v. Hesdorffer.[30] This case is here noted upon one narrow point. A deed of trust provided that should the trustee named therein fail to perform the duties of the trust, the beneficiary "or his assigns is empowered to appoint in writing, someone else in his stead. . . ." The beneficiary died and his duly qualified executor, acting as the executor of the deceased beneficiary, executed in writing the appointment of a substituted trustee. In attacking the foreclosure sale of the substituted trustee, the point was made that the substituted trustee was not appointed by the assignee of the beneficiary but by his executor. The court stated:

> One to whom the title to property has been legally transferred is an assignee thereof, and the legal title to a testator's property vests on his death, by act of law, in his executor; there fore, an executor is by act of law an assignee of his testator. . . .

Jaubert Brothers v. Walker.[31] Complainant-appellant attempted to enforce a judgment lien acquired against certain properties already subject to a deed of trust. While the judgment lien was a second lien subordinate to the deed of trust, the judgment debtor and the mortgagee agreed upon a conveyance of the property here attempted to be subjected to the judgment lien. The property, then subject to the deed of trust, was to be conveyed to the mortgagee in consideration of an $800 credit upon the mortgaged debt, then in the total amount of $3,275. The conveyance was executed for the stated consideration. The land in question was a 120-acre tract. The evidence showed the value of the land to have been $1.00 an acre at the time the $800 credit was given. Appellant took the position that the only manner by which a junior lien-holder could be put aside by a

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[29] 205 Miss. 590, 39 So.2d 257 (1949).
[30] 202 Miss. 711, 32 So.2d 442 (1947).
[31] 203 Miss. 242, 33 So.2d 827 (1948).

senior one was by formal foreclosure. In case of formal foreclosure appellant admitted the deed would relate back to the date of the senior encumbrance, displacing the junior encumbrance.

The court recognized the long-standing custom of foreclosures by agreement between the mortgagor and mortgagee. But where a junior lien-holder attacked a foreclosure consummated by such an agreement, the burden was upon the senior lien-holder, or those claiming through him, to show the mortgagor and mortgagee had not so dealt with the estate as to injure or destroy the rights of junior lien-holders. In carrying this burden, the court indicated that it was necessary to show: (1) the amount due upon the mortgaged debt at the time of the conveyance, (2) the value of the property at that time, (3) the fact that the debt was equal in amount to the value of the mortgaged estate, and (4) that the equity of redemption was valueless and hence no harm had come to junior judgment creditors through such acquisition of absolute title. This case was before the court upon a motion to strike the answers of appellees on ground they presented no defense sufficient in law. The court held that the burdens above mentioned had been met in every respect by the allegations of defendants' answer.

Statute of Frauds

Culpepper v. Chain.[32] Chain brought suit to confirm his title in certain lands against Culpepper. Chain claimed he offered and agreed to pay Culpepper $650 for certain property and that he had made a substantial cash payment and received a receipt for it, which he relied upon to bring this transaction outside the statute of frauds. Said receipt is as follows: "March 20, 1943. Received from Z. D. Chain the sum of $400.00 as payment on the place on which he now lives. Clarence Culpepper." It should be noted that this was a suit brought to confirm title and not a suit attempting to require the specific performance of a contract. The supreme court reversed a decree for complainant, but did not state in what necessary particulars the memorandum was insufficient.

Jones v. Hickson[33] contained a memorandum agreement found sufficient to take a contract for the sale of lands outside the statute of frauds for purposes of specific performance.

Wilson v. Combs.[34] An attorney, acting on oral authority given him by the grantor and grantee at the time of the execution of a deed, made a marginal notation on the already recorded deed to the effect that the deed was cancelled for failure of the grantee to support the grantor as she had

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[32]202 Miss. 309, 32 So.2d 266 (1947).
[33]204 Miss. 373, 37 So.2d 625 (1948).
[34]203 Miss. 286, 33 So.2d 830 (1948).

promised, such promise being the consideration for the execution of the deed. The court held that such authority, even if given and proved, is unenforceable.

Dixie Pine Products Company v. Breland[35] and *Rowan v. Rosenblatt*[36] both reaffirmed the well-established proposition that a conveyance of standing timber is a conveyance of real estate and to be enforceable must conform to the requirements of the statute of frauds.

Quieting Title

Silvey v. Upton.[37] In this case the court found certain instruments to be ineffective because of their vague descriptions. But it held that the right of complainant under Code Section 1324 to cancel, as a cloud on title, an instrument void on its face, may not be impaired by the instrument's ineffectiveness to do practical harm to one's title.

Church of the Living God v. Curry.[38] Suit was brought to cancel as a cloud on appellee's title the claim of church trustees who, through their agent, had entered upon the properties in question and had proceeded to demolish the buildings situated thereon. Appellants urged that a suit to cancel clouds upon title does not lie for a simple trespass. The court held that any claim or pretended claim of right or title asserted to real estate by one who is not the rightful owner may be cancelled under Code Section 1324. The taking of possession of the lot in question and the demolishing of the improvements on it amounted to the assertion of a pretended claim of right.

Magnolia Textiles v. Gillis.[39] Defendants insisted that a third party who held a contract to become a tenant in certain properties, the title to which was in question in this suit, had such an interest in the property as to be a necessary party defendant under the terms of Code Section 1324. The court pointed out that such a party owned no part of the title to the property involved and that his only concern was that of a prospective lessee. Hence he was not a necessary party.

Co-tenancy[40]

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[35] 205 Miss. 610, 39 So.2d 265 (1949).
[36] 39 So.2d 873 (Miss. 1949).
[37] 202 Miss. 485, 32 So.2d 267 (1947).
[38] 203 Miss. 279, 34 So.2d 494 (1948).
[39] 41 So.2d 6 (Miss. 1949).
[40] Several important and interesting cases dealing with aspects of co-tenancy were decided by the supreme court during the period of this review; however, each of those cases have been dealt with under the sub-titles *Adverse Possession and Prescription: Davis v. Gulf Refining Company,* 202 Miss. 808, 32 So.2d 133 (1948), *suggestion of error overruled,* 202 Miss. 808, 34 So.2d 731 (1948); *McDonald v. Roberson,* 204 Miss. 737, 38 So.2d 189 (1948); *Ferguson v. Chancellor,* 40 So.2d 279 (Miss. 1949); *Jones v. Hoover,* 204 Miss. 345, 37 So.2d 490 (1948); and *Oil and Gas: Hendrix v. Foote,* 205 Miss. 1, 36 So.2d 145 (1948), *suggestion of error sustained,* 205 Miss. 1, 38 So.2d 111 (1948).

Partition

Kittrall v. O'Flynn.[41] Appellee O'Flynn sought partition of certain lands claiming that a previous partition sale made when he was an infant was not valid because the party acting as his next friend became the purchaser at the sale. At the time of the bringing of the action, O'Flynn was twenty-nine years of age. The court held that since the decision in *Martin v. Gilleyler*[42] and the subsequent re-enactments of the statute there interpreted, being now Code Section 977, ". . . whatever else may be said for that statute, it must certainly be said and held that all questions which could be adequately raised by an appeal or by a bill of review or by repartition must be raised in the manner and within the time specified by the particular statute, else the statute would be practically stripped of any effective operation at all." The court held that purchase at a partition sale by a next friend rendered the sale voidable but not void. The period for re-partition, for appeal, or for a bill of review had long passed since O'Flynn had reached majority. A decree was rendered for defendant.

Dillon v. Hackett.[43] This case is of interest for two propositions. The first is that there is no necessity for process before a writ of assistance (which is the equivalent of the writ habere facias possessionem at law) can issue against a defendant to a partition suit who is in possession and who refuses to surrender it in face of the decree of the court. The second is that the spouse of a co-tenant living upon the common estate has no homestead or other interest which requires such spouse to be made party to a suit for partition.

Dantone v. Dantone.[44] Where the pleadings and proof in partition suit failed to show that a sale of the lands, or a part thereof, would better promote the interest of all parties than would a partition in kind, or failed to show that an equal division could not be made in kind, there should be no decree for a sale of the lands and division of the proceeds.

Conger v. Shaw.[45] Attorney's fees allowed in a final decree on partition of real properties, after the court had previously indicated in a dictated opinion that such fees would not be allowed, were held to be a vested right in the attorney to whom allowed, the final decree allowing such fees having not been appealed from.

Barnes v. Rogers[46] is of interest for the narrow point that, following the death of an owner of real property, his heirs may have partition of

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[41] 203 Miss. 164, 33 So.2d 628 (1948).
[42] 70 Miss. 324, 12 So. 254 (1893).
[43] 204 Miss. 464, 37 So.2d 744 (1948).
[44] 205 Miss. 420, 38 So.2d 908 (1949).
[45] 40 So.2d 308 (Miss. 1949).
[46] 41 So.2d 58 (Miss. 1949).

his real estate during the pendency of the administration and prior to the expiration of the period for probating claims. This privilege exists even though the debts owing by the estate cannot be realized from the personal property of the deceased.

Public Lands[47]

Koonce v. Board of Supervisors of Grenada County.[48] Koonce had secured the execution of a deed from the board of supervisors conveying to him timber on certain sixteenth section lands. The timber at the time of the conveyance was worth between $5,000 and $6,000. For this property Koonce had paid to the board $300. After Koonce cut timber valued at approximately $1,200, it was discovered that the deed given to him by the board did not describe the proper lands. Koonce instituted suit against the board in an attempt to reform his deed. The members of the board opposed the reformation suit and filed a cross bill seeking to recover the difference in the value of the timber already cut and the $300 consideration previously paid. The board was awarded a monetary decree for $900. On appeal, the supreme court said that when the board realized its mistake in selling timber on school lands for a very inadequate price, it was its duty to contest the purchaser's suit to reform the deed and to file a cross bill against the purchaser to recover the difference in the price paid by the purchaser and the value of the timber then cut.

Whitworth v. Mississippi State Highway Commission.[49] The Highway Commission brought suit against Whitworth and others to cancel the claim of defendants to oil, gas, and other minerals in the land described in two conveyances executed by the defendant to plaintiff. These conveyances embraced certain strips of land in Madison County occupied and used by the highway department as a highway. The court stated that the purpose of Mississippi highway statutes was the acquisition of lands solely for highway purposes. Whether acquiring by deed or condemnation proceedings, the commission took no more than it was empowered by statutes to acquire, viz: a right-of-way or easement, any further interest in the lands being unnecessary for highway purposes.[50]

32 So.2d 876, where the court directed its opinion to questions concerning the reformation of the deeds from appellant Whitworth.

James v. Gulf Refining Company.[51] This case is mentioned as one in which school trustees had abandoned school property. The court found

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[47]Two cases dealing with the vesting of title to school lands in private individuals have been treated under the title *Adverse Possession and Prescription. Foster v. Jefferson County,* 202 Miss. 629, 32 So.2d 126 (1947); and *Jones v. State,* 202 Miss. 705, 32 So.2d 435 (1948).

[48]202 Miss. 473, 32 So.2d 264 (1947).

[49]203 Miss. 94, 33 So.2d 612 (1948).

[50]In rendering this decision, the court withdrew its former opinion appearing in [51]41 So.2d 2 (Miss. 1949).

that the land had ceased to be used for school purposes and that it reverted to the grantor. The evaluation of this factual situation will be of interest in future questions of re-entry and reversion following abandonment.

Landlord and Tenant

Young v. Weaver.[52] This is a case of interest if rent controls should be continued. Each step in the proceedings to evict this tenant, including the permission of the area rent control office, was based on the theory that the tenant through his conduct was maintaining a nuisance. The court found that the evidence did not support a case against the tenant on the theory of nuisance.

Hotel Markham v. Patterson.[53] In August, 1943, defendant hotel entered into an arrangement with Patterson whereby he was to have the privilege of usingth e barbershop in the hotel and its equipment on condition that he operate a barbershop during certain hours. Patterson was to pay $7.00 a week to the hotel. This arrangement continued until March, 1946, when the defendant hotel changed the lock and rented the barbershop to another without notice to or the consent of Patterson. The defendant claimed Patterson was not a tenant but only a licensee and therefore not entitled to notice. The court quoted from *Baseball Publishing Company v. Bruton*[54] and said:

> Patterson upon payment of the rent was entitled to possession of the premises. He did have possession and exclusive means of lawful entry to the shop. The acts performed by him upon the premises were not sporadic. They were consistent and continuous and constituted a business. The relation of landlord and tenant existed between the parties.

Sledge v. Potts.[55] Appeal was taken from a judgment sustaining a demurrer to a declaration that attempted to recover the reasonable rental value of certain farm lands. These lands the defendant had contracted to operate as a share tenant for the year 1944. He had agreed to pay as rent one-fourth of all cotton, one-third of all corn, and an additional reasonable rent for other crops grown on the land. The defendant abandoned the lands on May 27, 1944. The court said that: ". . . a tenant upon shares under a farming contract is under legal duty to cultivate the land . . .," and that the extent and manner of that cultivation, ". . . is addressed to the wisdom and standards of good husbandry to which the tenant must

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[52]202 Miss. 291, 32 So.2d 202 (1947).
[53]202 Miss. 451, 32 So.2d 255 (1947).
[54]302 Mass. 54, 18 N.E.2d 362 (1938).
[55]202 Miss. 480, 32 So.2d 262 (1947).

conform." In reviewing the case, the court said that mere uncertainty as to the amount of profits to be realized from good husbandry ". . . is not an insuperable obstacle to a reasonable assessment of damages."

In both *McKay v. Shaffer*[56] and *James v. Shaffer*[57] the court held that a tenant could acquire a tax title adverse to his landlord, and that he is estopped to assert it only during the period of the tenancy.

Stovall v. Gardner[58] authorized the eviction of a tenant and exaction of double rent under Code Section 947.[59]

Phillips v. Box.[60] We find the court faced with two conflicting claims —the claim of a landlord who has a lien upon his tenant's crops under the provisions of Code Section 908 and the claim of Phillips who had purchased from the landlord's tenant, without actual notice of the landlord's lien, negotiable warehouse receipts representing cotton grown on the landlord's property. The receipts were issued under the Uniform Warehouse Receipts Act. The court said[61] that proof of waiver of the landlord's lien must be established by a preponderance of the testimony affirmatively showing an agreement by the landlord, or conduct tantamount to an agreement, that the tenant might deal with the proceeds as if free of any lien.

Judge McGehee pointed out that the paramount lien of the landlord had not been displaced in any of the previous decisions of the court, by the Uniform Warehouse Receipts Act, ". . . except in cases where the tenant has been entrusted with such receipts by the landlord and thereby placed in a position to negotiate them to an innocent purchaser for value. . . ."

McCoy v. McRae[62] involved a summary proceeding of ejectment, in which plaintiff claimed under a trustee's foreclosure deed. The court held that he failed to establish the necessary prima facie case as to the validity of this deed, and so could not prevail in the ejectment action.

Oil and Gas

Pettis v. Brown[63] follows the case of *Stern v. Parker,*[64] and holds that where severed mineral interests are not separately assessed from the base title, a sale of the land for taxes carries with it those severed mineral interests not separately assessed.

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[56]202 Miss. 558, 32 So.2d 746 (1947).
[57]202 Miss. 565, 32 So.2d 749 (1947).
[58]203 Miss. 527, 36 So.2d 163 (1948).
[59]Miss. Code § 947 (1942).
[60]204 Miss. 231, 37 So.2d 266 (1948).
[61]108 Miss. 697, 178 So. 90 (1938).
[62]204 Miss. 309, 37 So.2d 353 (1948).
[63]203 Miss. 292, 33 So.2d 809 (1948).
[64]200 Miss. 27, 25 So.2d 787 (1946); 200 Miss. 41, 27 So.2d 402 (1946).

Palmer v. Crews[65] was a suit to quiet title to certain mineral interests. The controlling question was the construction of the following provision contained in the will of one C. C. Crews, a non-resident: ". . . In addition to the above, I bequeath to my wife . . . all my royalties during her lifetime and thereafter to go to my brother . . . ." Did the phrase all my royalties embrace all severed Mississippi mineral interests, whether acquired by deed or lease? Recognizing the rule that a will is to be construed, as to the intended disposition of property in another state, according to the laws of the domicile of the testator (who was in this case domiciled in Texas), unless it is clear from the instrument itself that the testator intended the laws of the former state should control (such intention not appearing here), the court stated:

> . . . It is well settled by numerous decisions of the Supreme Court of Texas as is true elsewhere that the terms 'royalty,' 'minerals in place acquired by deed,' and 'leases of oil, gas and other minerals,' have well defined meanings as separate and distinct estates when one is compared to the other.

The court then proceeded to set out definitions of royalty, distinguishing a royalty interest from a mineral interest in place acquired by deed or from the working interest of an oil and gas lease. Although the court specifically recognizes a royalty interest as an interest in real estate, the point is made that the distinction is to be kept clearly in mind between the thing itself, viz., minerals in place, and the proceeds thereof, the royalties. The court therefore held that testator died intestate as to all leaseholds for oil and gas and as to all interests in minerals in place acquired by mineral deed, no royalties having been produced from such minerals in place.

Anderson v. Butler.[66] Complainant brought suit to establish his title to an undivided one-half interest in certain minerals in place. The mineral deed under which complainant claimed purported to convey to him ". . . an undivided one-sixteenth interest in all the oil, gas, coal, and other minerals now or at any time hereafter lying in or under the following described tract of land. . . ."

This granting clause was further supported by the final paragraph of the instrument as follows:

> . . . and it is further expressly declared that it is the true intent and purpose of this conveyance to pass to and vest in the

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[65]203 Miss. 806, 35 So.2d 430 (1948).
[66]203 Miss. 512, 35 So.2d 709 (1948).

> said F. A. Anderson, Jr., an undivided one-sixteenth interest in all of the mineral rights in the land first described herein. . . .

However, in the body of the instrument and immediately following the description of the land, the following appears:

> . . . also an undivided one-half interest in all my right, title, and interest under and by virtue of an oil and gas mining lease or other mineral lease now or hereafter existing upon said premises or any part thereof including all rental and royalties accrued. . . .

Complainant contended that this latter clause, conveying to him one-half the lessor's rights and privileges, enlarged the one-sixteenth mineral interest to a one-half interest in the minerals in place.

The court determined that complainant owned only a one-sixteenth interest in the minerals. It thought that there was nothing ambiguous in the distinction in amount between the undivided interests in minerals in place conveyed complainant and the undivided interest in rentals, royalties and other benefits conveyed complainant under the terms of the same instrument.

Hendrix v. Foote.[67] Here an undivided one-half interest in and to the oil, gas, and other minerals under certain lands and an undivided one-fourth interest in and to the oil, gas, and other minerals under certain other lands had been severed by mineral deeds. These severed mineral estates were separatly assessed on the assessment rolls of Wayne County as follows: "one-half of mineral interest NW NW and SW NW, Section 31 . . ." and: "one-fourth mineral interest SW NE and NE SE, Section 3. . . ." The surface or base title, owned separately, was assessed to another party. These separate assessments were made under the authority of Code Section 9770, which provides, in part, that severed oil, gas, and mineral rights

> . . . shall be assessed and taxed separately from such surface rights and interests in said real estate, and shall be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes.

The court found that Foote, who owned these mineral interests at the time of the tax sale at which appellant Hendrix bought, was at that time a tenant in common with the owner of the base title, that is, the surface and remaining unsevered mineral interest, and therefore that the assess-

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[67] 205 Miss. 2, 36 So.2d 145 (1948); 205 Miss. 9, 38 So.2d 111 (1948).

ment and tax sale were both void because they violated Code Section 9772, which states that:

> If more than one person shall claim to be the owner of the same tract or parcel of land the assessor shall so state in his assessment roll, and the tax collector shall only collect the taxes on one assessment.

The court proceeded to elaborate upon this position, but nowhere attempted to reconcile the conflicts between Sections 9770 and 9772.

In a decision of far-reaching effect, the court on suggestion of error reversed its original position. It said that Section 9772 had been a part of the statute law of Mississippi since 1848, while Section 9770 was enacted in 1930, after oil and gas had come to the State of Mississippi, a development that could not have been anticipated by the lawmakers of 1848. The court found that although both sections deal with the assessment of real property, and although Section 9770 is dependent upon Section 9772 for a part of the plan of assessment and collection of ad valorem taxes, Section 9770 is not in *pari materia* with Section 9772, for the subject matter dealt with in the former is entirely different from that dealt with and in the contemplation of the legislature at the time Section 9772 was enacted, a hundred years ago.

It should be noted that this decision, concluding that Section 9770 requires a separate assessment of severed fractional interests in oil and gas in place, is in apparent conflict with the dicta of the court in *Gulf Refining Company v. Stone*[68] and the holding of the court in *Smith County Oil Company v. Board of Supervisors of Simpson County.*[69] These earlier decisions indicated that there could be no valid assessment for ad valorem taxes of severed non-producing mineral interests. To the extent of these conflicts, the latter two cases were impliedly overruled by the opinion on suggestion of error.

Bailey v. Federal Land Bank of New Orleans.[70] The supreme court, in this case, confirmed its opinion expressed in the final decision of *Hendrix v. Foote,* to the effect that under the provisions of Code Section 9770, severed mineral interests might be separately assessed. The *Hendrix* case impliedly overruled the *Smith County Oil Company* case. In the latter the court had taken the position that severed non-producing royalty interests could not validly be the subject of ad valorem taxation. The same ques-

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[68]197 Miss. 713, 21 So.2d 19 (1945).
[69]200 Miss. 18, 25 So.2d 457 (1946), *suggestion of error overruled,* 200 Miss. 18, 26 So.2d 685 (1946).
[70]40 So.2d 173 (Miss. 1949).

tion, involving an identical mineral interest, was again before the court in the *Bailey* case. Here the Federal Land Bank owned a severed non-producing mineral interest upon which it had granted an oil and gas lease. The appellant attempted to have a back-assessment of this non-producing royalty interest. The supreme court reiterated its often affirmed position that separately owned oil and gas mineral rights constitute an interest in real estate, and that the royalty interest retained by the lessor in an oil and gas lease is an interest in real estate, as is an undivided mineral interest not subject to lease. The court then went further than did the opinion in *Hendrix v. Foote,* and specifically overruled the *Smith County Oil Company* case aforementioned. Further, the dicta appearing in *Gulf Refining Company v. Stone,*[71] which indicated that severed non-producing mineral interests could not be validly assessed for ad valorem taxation, was declared to be unnecessary to the decision of that case and was by this opinion specifically repudiated.

State v. Cummings[72] represents the culmination of a series of questions arising out of the opinions of the court rendered in *Stone v. Gulf Refining Company* and the *Smith County Oil Company* case. Judge Roberds said, by way of dissent in the *Smith County Oil Company* case:

> I think with great deference to my brethren that the majority opinion erroneously and unnecessarily nullifies to a great extent Section 9770, Code of 1942, and deprives the state and its subdivisions of an important source of revenue which will likely result in many demands and much litigation to recover taxes which under the holding in this case have been erroneously paid. . . .

The *Cummings* case came before the court as test litigation for many cases attempting to collect from the state and its subdivisions those taxes mentioned by Judge Roberds in his dissenting opinion. However, in view of the decision of the court on suggestion of error in *Hendrix v. Foote,* and *Bailey v. Federal Land Bank,* the basic issues concerning the validity of the assessment of such taxes had already been determined. In this case an attempt was made to recover ad valorem taxes paid on mineral interests which were subject to a valid producing lease. No point was raised as to the method of assessment employed by the clerk under the mandate of Code Section 9770, but the sole ground of attack was the contention that following the *Smith County Oil Company* case, such an assessment could not be legally made. The court, pointing out that the interests involved

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[71] 197 Miss. 713, 21 So.2d 19 (1945).
[72] 40 So.2d 587 (Miss. 1949).

in the *Cummings* case were producing royalty interests while the interests in prior cases were non-producing royalty interests, followed its former decisions overruling the *Smith County Oil Company* case and disclaiming the unnecessary dicta of the *Gulf Refining Company* case.

Logs and Logging

Flowers v. R. A. Vinton Lumber Company[73] is of interest for the proposition that a court of equity may extend the time allowed for cutting and removing timber if equitable grounds of excuse for removing the timber at a time later than the date specified are shown. Thus where failure to cut and remove timber within the time limited is caused by acts of the seller, the time for removal should be extended by adding to it the period of such interruption. However, attention should be called to the dissent of Chief Justice Sydney Smith, in which he states that, for such relief to be afforded by a court of equity, it should be shown that the aggrieved party was actually prevented by the owner of the land from cutting the timber thereon. He was of the opinion that under the facts of this case, too complicated to be developed here, the timber purchaser was not prevented by the acts of his grantor from removing the timber, but that the purchaser acted upon his own volition in refraining from further cutting.

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[73]203 Miss. 420, 35 So.2d 300 (1948).

IX

TORTS

*Ross R. Barnett**

The Mississippi Supreme Court has decided a number of interesting tort cases during the past few months. The largest number of cases decided grew out of automobile accidents, which indicates that automobile damage suit litigation for the past several years has continued to grow.

The supreme court decided tort cases involving automobiles, master and servant, charity, animals, mines and minerals, trespass, municipal corporations, libel and slander, railroads, busses, newspapers, false imprisonment and innkeepers. Similar cases will be grouped together.

Animals

The case of *Seven Day Wholesale Grovery v. Jarvis*[1] involved a suit for damages by an owner of livestock, in which the owner claimed that the livestock died from eating cotton poison which was deposited by the defendant in a ditch. The poison had been stored in the defendant's warehouse, which burned. The calcium arsenate became wet and unuseful, whereupon it was put into a ditch in an effort to dispose of it. A judgment for the plaintiff was reversed on the ground that the plaintiff's proof was insufficient to show that the animals ate the poison. The court pointed out that mere proof that the animals died and their bodies were found about 80 steps from the ditch containing the poison was not sufficient to meet the burden of proof.

Charities

In the case of *International Order of Twelve of Knights and Daughters of Tabor in Mississippi v. Bonds*[2] the supreme court reaffirmed the rule that a charitable hospital cannot be held liable for injuries sustained by a patient unless it is shown that the hospital was negligent in the selection of its employees. The case also follows the rule in Mississippi to the effect that a charitable institution is not liable under the doctrine of respondent superior. This case fails to take into consideration changing public policy. It is generally known that hospitals carry liability insurance; however, the Supreme Court of Mississippi, in a prior case, *Mississippi Baptist Hospital v. Moore*,[3] decided in 1930, held that even though such an institution had liability insurance there was no liability.

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[1]202 Miss. 446, 32 So.2d 253 (1947).
[2]204 Miss. 333, 37 So.2d 487 (1948).
[3]156 Miss. 676, 126 So. 465 (1930).

There seems to be a trend away from this thought at the present time, as is evidenced by an Illinois case decided in 1947, which held that where the hospital carries liability insurance it should be held liable for the negligence of its servants because in such case the trust funds of the charity would not be harmed.[4] A very interesting case which discusses this problem thoroughly is *President and Directors of Georgetown College v. Hughes.*[5] It is believed that a patient who enters a hospital and pays his money for treatment should be entitled to reasonably safe treatment. The high cost of hospital care at the present time does not impress the patient as being charity, and if he is injured through some negligence of the hospital's employees while acting within the scope of their employment and in the line of duty, the hospital should be liable in the same manner as any private person or corporation. The modern trend and growth of business demand that the general rule should be one of liability rather than immunity from liability, as is evidenced by the recent Federal Tort Claims Act.

For hundreds of years, it was impossible for a person to sue the United States Government in tort, but in 1945 the Federal Tort Claims Act passed by the Congress remedied this situation, thus getting away from the old idea that the "King can do no wrong."

Private Hospitals

The rule that the owner of a private hospital operated for profit is liable to a paying patient for damages for negligence of his employees is followed in *Palmer v. Clarksdale Hospital.*[6] This case points out that in Mississippi there is a distinction between a private and a charitable hospital; but it seems that the rule should be the same in both instances, so far as the paying patient is concerned. This case also contains a very good discussion of the *res ipsa loquitur* rule.

Attractive Nuisances

In the case of *Vincent v. Barnhill,*[7] an action was brought for damages for the death of a seven year old boy, who drowned in an old vat which had previously been built at a bleaching plant, which had not been operated for several years. The location was in a six acre field on the outskirts of the City of Meridian. The vat was on the property when the appellants bought it several years before the accident, and was not hidden, but could be seen for a distance of 50 feet or more, and was about 35 feet

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[4]Wendt v. Servite, 332 Ill. App. 618, 76 N.E.2d 342 (1947).
[5]130 F.2d 810 (App. D. C. 1942).
[6]40 So.2d 582 (Miss. 1949).
[7]203 Miss. 740, 34 So.2d 363 (1948).

long, 8 feet wide and 5 feet deep, with the concrete sides a few inches above the ground. A judgment for the plaintiff was reversed and judgment entered for appellants, the court saying that the land owners were not liable under the attractive nuisance doctrine, because the vat was not hidden or secret, and because the boy had been repeatedly warned by his family to stay away from it. The court refused to extend the attractive nuisance doctrine to a case involving impounded water in a vat such as the one involved, and stated that the tendency is to limit rather than extend the attractive nuisance doctrine. The court stated that a pond of water might be attractive to a young child, but it being merely an attractive agency is not sufficient to subject the owner of it to liability. It must be such an attractive agency as is likely to or will probably result in injuries to those who might be attracted to it.

Newspapers

In *Meridian Star v. Kay*[8] a merchant brought suit against a newspaper asking for damages on account of the negligence of the publisher in erroneously publishing an advertisement. The merchant ran an advertisement in the paper as follows: "Kay's Pre-Christmas Clearance of Coats, Suits, Dresses, 25% off—etc."

The paper was instructed to run a similar ad later, but published the ad about ten days too soon, and instead of stating that the merchandise would be at a 25 per cent discount, stated that the entire stock of fall and winter coats, suits and dresses were one-half or 50 per cent off. After the mistake was discovered, the merchant discussed it with the defendant publisher and both plaintiff and defendant decided that it would be better for the merchant to proceed with the sale of the merchandise at a 50 per cent discount, and both decided that to do otherwise would seriously damage the reputation of the merchant. A suit for damages was brought resulting in a verdict for the plaintiff. On appeal, the supreme court affirmed the judgment as to liability, and remanded the case on the issue of damages alone. The court stated that it was a jury question as to whether or not the merchant's act in selling the goods at a 50 per cent discount was reasonable in view of the conduct and assurance of the publisher that such should be done, or whether or not it was solely the merchant's own independent judgment.

Assault and Battery

The case of *Holliman v. Lucas*[9] deals with the question of whether or not insulting words which provoke an assault and battery with the fists and feet are a sufficient excuse for the assault.

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[8] 41 So.2d 30 (Miss. 1949).
[9] 202 Miss. 463, 32 So.2d 259 (1947).

In this case an employee, upon being paid off by his employer, complained that the number of hours had not been computed accurately. After the employer agreed to the adjustment, which was claimed, he then told the employee that he was discharging him because the employee made a habit of expressing dissatisfaction about his time and pay. The employee then addressed a series of profane and revolting epithets to his employer, whereupon his employer struck him with his fist and kicked him. The court discusses Section 2525, Mississippi Code of 1942, and states that the defendant may give in evidence in excuse or justification insulting words used by the person on whom the assault and battery is committed, and restates the rule that this statute applies both in civil and criminal cases of this type. The court points out that this case is not a proper one for the award of punitive damages, and in effect, says that it would be against public policy to allow punitive damages in cases of this nature, and said:

> No man should be permitted to employ such insulting language toward another as that admitted by the plaintiff here and then recover punitive damages for an assault and battery which he necessarily knows is likely to be provoked by its use, and where, as in the case at bar, the defendant uses only his hands and feet in expressing a righteous indignation on account of the insult and does not inflict an excessive injury such as would show an oppressive attitude and wanton or malicious spirit on his part.

Another assault and battery case, *Hawkins v. Stringer*,[10] involved the actions of a sheriff who allegedly struck the plaintiff several times on the head with a pistol, as the sheriff was conducting a prisoner to jail. A verdict for the plaintiff in the amount of $5,700 was affirmed on liability, but reversed on the question of damages. This case also points out that physical damage and suffering are not susceptible of exact measurement. A dissenting opinion by Justice Hall points out the importance of suing for punitive damages in proper cases, and asking instructions thereon, for without requesting punitive damages, the same cannot be allowed.

[10]205 Miss. 121, 38 So.2d 454 (Miss. 1949).

False Imprisonment

The case of *State for the Use of Kelly v. Yearwood*[11] was a suit in tort against a member of the Mississippi State Highway Patrol, and the surety upon his official bond. The patrolman was summoned to the scene of an automobile accident, and found the plaintiff intoxicated. The patrolman arrested her upon a charge of being drunk in a public place, in the presence of two or more persons, the public place being the highway, and

[11]204 Miss. 181, 37 So.2d 174 (1948).

placed her in jail at Hattiesburg. The plaintiff was released from jail the following morning. The basis of the suit was the contention that the officer, instead of putting the plaintiff in jail, should have taken her before a proper officer without unnecessary delay for a hearing of her case, as required by Code Section 2473. The plaintiff contended that the proper officer before whom she should have been taken was the Justice of the Peace, at Sumrall, Mississippi. The court stated that the detention of one who is in an intoxicated condition does not become unreasonable "until the prisoner has been restored to a degree of sobriety, which would guarantee against re-arrest."

In *Simonton v. Moore*[12] plaintiff filed a declaration in two counts: one for breach of contract and one for tort, and on this declaration, a jury awarded $1500 damages. The defendant operated a parking lot where the plaintiff lived in a trailer. Electricity was furnished by the defendant. Plaintiff alleged that one night the defendant cut off the current at a time when the plaintiff's child was sick, and that an attending physician, who had to be called in the middle of the night, could not properly treat the child, because of the absence of electric lights. There was a conflict in the evidence as to whether or not the defendant pulled out a plug to cut off the lights, or whether the stoppage was due to a short circuit in the wiring of plaintiff's trailer. However, the physician testified that he had a flash-light and that the absence of electric lights did not hinder him in treating the child. The first count was for damages for breach of contract, or for a breach of duty.

The second count was in tort, on the ground that the defendant had maliciously caused plaintiff to be arrested and jailed, for cursing her. The plaintiff spent about two hours in jail before making bond, and when his case came up in the justice of the peace court, plaintiff was unable to appear on account of illness, and the justice of the peace dismissed the action. The court reversed a judgment for the plaintiff, and remanded the case, saying that in the first place the declaration was improper, having one count for tort and one for breach of contract. The court also stated that the jury should have been instructed in the lower court that plaintiff was not entitled to punitive damages. The case was reversed on account of erroneous instructions granted plaintiff.

Innkeepers

In *Picard v. Waggoner*[13] plaintiff brought suit for damages alleging that she stepped into an open vent of a sewer on the defendant's property and was injured. The declaration did not allege on what part of the

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[12]204 Miss. 760, 38 So.2d 94 (1948).
[13]204 Miss. 366, 37 So.2d 567 (1948).

property the vent was located. The supreme court reversed a judgment for the plaintiff and remanded the case, saying that the declaration and proof were too indefinite, and that the plaintiff should have made her declaration more specific, citing the general rule that an innkeeper is not under a duty to a guest to maintain the entire premises in a safe condition, but only such parts as by invitation or customary use the guest would reasonably be expected to use. The evidence showed that the vent complained of was not within or close to either the two entrance-ways furnished by the defendant.

In *Kerr v. Hudson Hotel Company*[14] plaintiff registered as a guest in the hotel. A bell-boy employed by the hotel came to work in a drunken condition, and the manager of the hotel carried the bell-boy to the employee's dressing room, where he took the uniform off of him and told him to stay there until he sobered up. The bell-boy later put on his civilian clothes and after lighting a cigarette threw the match on some paper in the room. Shortly thereafter the hotel caught on fire, and the plaintiff sued the hotel for the loss of baggage and personal property to the value of $428. The court affirmed a judgment for the defendant, citing Code Section 7153, to the effect that the hotel was not an insurer, and that if liable at all there must be shown a failure by it to exercise ordinary care required of a bailee for hire, as to the safe-keeping of the property of his guests. The court states that after the hotel manager removed the uniform from the bell-boy, and ordered him to stay in the employee's dressing room, the bell-boy was no longer an employee of the hotel, but a mere licensee, and that the facts did not show an absence of reasonable care on the part of the defendant.

Trespass

I the case of *Bankston v. Dumont*[15] plaintiff was employed as a clerk in defendant's store. She alleged that the defendant went into her purse, which she kept under a counter, and removed a lady's slip, which she had taken out of stock, and had told another saleslady that she was going to have the defendant charge to her when he returned to the store. She also claimed that he removed a $10 bill from her purse. The evidence showed that he returned the bill to her, admitting that he had taken it from the purse. The court held that it was error for the circuit court to grant a peremptory instruction for the defendant and that the plaintiff stated a good cause of action when she alleged in her declaration that the money had been removed from her purse without her consent. The cause was reversed and remanded for a new trial.

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[14]204 Miss. 396, 37 So.2d 630 (1948).
[15]205 Miss. 272, 38 So.2d 721 (1949).

The case of *Doom v. Thompson*[16] holds that persons committing trespass under the directions of another are severally liable. *Wroten v. Fenn*[17] was a suit for damages for the cutting and conversion of trees. The case really turned on the question of whether the case should be transferred to the chancery court, to ascertain the correct boundary lines. It appeared from the evidence that a recent survey did not check precisely with location of a stream as shown in the survey notes made about one hundred years prior to the trial.

Triangle Amusement Company v. Benigno[18] was a suit for damages because of defendant's willful destruction of a music box, which plaintiff had placed in defendant's place of business on a profit sharing basis. The decision turned on the question of who really destroyed the box, whether the defendant or someone else.

In *Campbell v. Willard*[19] deceased climbed upon a structure erected by the defendants upon their lands for the purpose of collecting and washing gravel. Deceased was a co-owner of a gravel truck, which was brought to the scene of the accident by another person. Deceased came to the place entirely on his own, and as gravel was not then being loaded, he went up on top of the bins to see how much gravel was in them, and the structure collapsed, killing him. There was testimony to the effect that persons present warned him not to get in the way, and to stay away from the structure. The court held the defendants were not liable in the absence of actual or imputed knowledge of an apparent or latent defect in the structure, and that defendants owed the deceased no duty except that owed a trespasser, which was not to willfully injure him.

Gas

In *Gill v. Eakin*[20] a judgment of $10,000 was recovered for the death of the plaintiff's wife and injuries to himself, as a result of an explosion of a butane gas system which had just been installed in the plaintiff's home by the defendant. The testimony showed that plaintiff had paid hospital, doctors' and medical expenses of $3,025.69. The jury verdict awarded plaintiff $10,000 actual damages and $5,000 punitive damages. The supreme court affirmed the lower court on liability, but reversed the case on the issue of damages, stating that the amount awarded the plaintiff was not adequate, especially in view of the fact that the plaintiff had paid in excess of $3,000 expenses.

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[16] 35 So.2d 535 (Miss. 1948).
[17] 203 Miss. 361, 35 So.2d 534 (1948).
[18] 35 So.2d 454 (Miss. 1948).
[19] 205 Miss. 783, 39 So.2d 483 (1949).
[20] 203 Miss. 204, 33 So.2d 821 (1948).

In *Mississippi Power and Light Company v. Thomas*[21] plaintiff sued the defendant for damages and personal injuries suffered when gas which escaped from a pipe line laid by the defendant ignited from a spark of plaintiff's automobile when it was started in her garage. Plaintiff claimed that the gas pipe line was not installed properly, and also claimed that the defendant used an improper union or coupling for connecting the pipe. The accident happened about three years after the gas line was laid. A judgment for the plaintiff was affirmed by a divided court, and a suggestion of error was later overruled.[22]

Libel and Slander

In the case of *Montgomery Ward and Company v. Harland,*[23] a suit was brought by an employee of Montgomery Ward for slander, by which statement the assistant manager of Montgomery Ward charged that one of three employees, one of whom was plaintiff, had trifled with the money of the company and had hidden it with ill intentions. A judgment for the plaintiff in the amount of $15,000 was affirmed with a remittitur of $7,500. This was a companion case to those of *Montgomery Ward and Company v. Skinner*[24] and *Montgomery Ward and Company v. Blakely.*[25] This decision reiterated the rule that a statement by a manager of a store charging one of three employees with trifling with the store's money with ill intentions was actionable, even though the statement did not charge that all three were guilty and did not single out the plaintiff.

Fraud and Deceit

In *Reed v. Charping*[26] plaintiffs brought suit against defendant for recovery of damages for fraud and deceit on account of representations made by the defendant in a sale of land to the plaintiffs. Plaintiffs claimed that the defendant, to induce them to buy the lands in question, represented to them as a fact that there were not less than 5,000 acres of cultivated land within the protection of the Mississippi River Levee, and that plaintiffs relied upon this and upon the property, and that in fact there were only about 3,500 cultivated acres so protected by the levee, which fact was discovered only after plaintiffs had paid most of the purchase price and had spent a great deal of money on the property. The court said plaintiffs could recover for the misrepresentations and deceit as to the amount of cultivated land within the protection of the levee, and stated that a pur-

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[21] 39 So.2d 759 (Miss. 1949).
[22] 40 So.2d 597 (Miss. 1949).
[23] 205 Miss. 380, 38 So.2d 771 (1949).
[24] 200 Miss. 44, 25 So.2d 572 (1946).
[25] 200 Miss. 81, 25 So.2d 585 (1946).
[26] 41 So.2d 11 (Miss. 1949).

chaser of land has a right to rely upon the seller's statements of fact within his knowledge, and the seller cannot escape liability by showing that the buyer might have ascertained the falsity of such statement.

Waters and Water Courses

In *Brinkly v. Eaton*[27] plaintiff brought suit for injunctive relief and damages on account of diversion of waters from the defendant's lands onto the land of the plaintiff. The judgment for the defendant was affirmed, the court stating that when an owner of land constructs an artificial drain on his own land, he is not required to maintain it when later acts of nature place an unreasonable burden upon him. The facts of the case indicated that the damage was caused by nature, rather than by any acts of the defendant.

Master – Servant

In *Davidson v. McIntyre*[28] plaintiff fell into a grease pit at the defendant's garage, where he was employed. One of the grounds of negligence charged was that defendant failed to have the room properly lighted. The proof showed that one of the lights near the pit had burned out, and that the socket where another one should have been was out of repair. The lower court granted a peremptory instruction for the defendant, but the case was reversed. The supreme court stated that it was a jury question whether or not the defendants had exercised reasonable care to furnish plaintiff a reasonably safe place to work.

In *Bonelli v. Flowers*[29] an inexperienced employee was injured while operating a ripsaw, which was not equipped with a guard. The saw originally had a guard, but the same had been discarded because it slowed up the work. The plaintiff recovered a verdict for $14,000, but the circuit court entered a remittitur of $7,000 which was upheld. The court said that an employer has the duty to instruct a young, inexperienced employee how to operate the saw, and that whether or not they had done so was a jury question.

In *Montgomery Ward and Company v. Nickens,*[30] the court did not announce any new rules, insofar as master-servant law is concerned, but it announced the rule that a married woman under Code Section 451 has a right to make any contract she might have made while a feme sole, and that she could recover for amounts expended for doctors, hospital, and medicines, resulting from the accident complained of. The plaintiff was

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[27]205 Miss. 815, 39 So.2d 491 (1949).
[28]202 Miss. 325, 32 So.2d 150 (1947).
[29]203 Miss. 843, 33 So.2d 455 (1948).
[30]203 Miss. 195, 33 So.2d 815 (1948).

attempting to unroll linoleum, when the roll of linoleum fell, causing her to fall violently to the floor, resulting in a serious back injury. She charged that she did not have sufficient help, and also that the master failed to furnish reasonably safe appliances with which to work. The jury awarded plaintiff a verdict for $20,000, which was upheld by the supreme court.

In *Allgood v. United Gas Corporation*[31] plaintiff sued for damages on account of being injured while employed by the defendant, upon the theory that an unsuitable appliance was furnished him. It appeared that his foreman instructed him to carry a one-gallon can full of boiling asphalt. The can did not have a bail or a handle, and in carrying out the orders of his foreman, plaintiff had to either go over a pile of dirt, or step down into a service ditch. In going through the ditch, one of his feet stepped on a fruit jar, which he did not know was there, causing him to fall and be burned by the hot asphalt. The lower court granted a peremptory instruction for the defendant, and on appeal the supreme court reversed and remanded the case, saying it was a jury question as to whether or not there was a reasonable probability that the master was negligent in failing to furnish the employee with a suitable appliance, and whether or not that negligence was still in operation at the time he fell into the ditch. There was a dissenting opinion by the three judges.

In *Goff v. Randall*[32] it appeared that plaintiff was employed by defendant as an inside painter, and requested a ladder to be used in painting the walls and ceiling of the rooms. Defendant stated he had no ladder, whereupon plaintiff constructed a make-shift scaffold. Plaintiff called this to the attention of his employer, and was told that he was to continue his work, and that a ladder would be provided, but this was never done. The lower court dismissed the suit upon defendant's demurrer, but the supreme court reversed the case and pointed out the fact that the declaration charged the scaffold was unsuitable and that the employee had been directed to continue working and in disregard for his request for a ladder. Therefore, the workman did not assume the risk incident to the employer, because the master had not exercised reasonable care to furnish him reasonably safe appliance for doing the work.

In *Collins v. McLain*[33] plaintiff was helping unload pipe from a railroad car for the Gulf Refining Company. It appeared that plaintiff was an employee of Collins Trucking Company. He alleged that the foreman, who was an employee of the Gulf Refining Company, was negligent in the operation of a winch in placing the pipe on the truck, and alleged that the

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[31]204 Miss. 94, 37 So.2d 12 (1948).
[32]39 So.2d 881 (Miss. 1949).
[33]40 So.2d 183 (Miss. 1949).

servant of the Gulf Refining Company negligently swung a piece of the pipe across his hand. The court held there was no liability as to the Gulf Refining Company, and remanded the case as to the other defendant, stating that the plaintiff failed to prove that the alleged foreman was, in fact, a foreman rather than a fellow servant, and failed to prove that a signal was negligently given. Three judges dissented from the majority opinion.

In *Danciger Oil and Refining Company v. Free*[34] plaintiff sued for damages for the loss of his eye, sustained while in the employ of the defendant. A chain consisting of lengths attached together with pins formed part of the draining rig at the oil well site. The chain transmitted power from the boiler to the rotary shaft. The chain broke, and the machinery was stopped, after which the plaintiff took the chain, put the broken part in a vise and began to beat on it with a hammer to get the pin out, and in doing so, a small sliver of steel struck him in the eye. There was evidence that the chain was old and had broken before, and that the plaintiff had asked for a new chain. The court stated that neither the running of the machinery nor the machinery itself caused the injury, but that the proximate cause of the injury was the blow upon the chain with the hammer. The court said that it was a simple operation with a simple tool, for which the defendant was not liable.

Municipal Corporations

In *Ming v. City of Jackson*[35] plaintiff sought to recover damages suffered from a fall as a result of stepping into a hole in a sidewalk in the City of Jackson. The accident occurred at night, and the declaration was in two counts, the first upon negligence in allowing the defect to remain, and the second upon a failure to erect and maintain street lights near the place. It appeared that the hole was about eight inches wide, four and one-half inches deep, with an iron pipe about three and one-half inches in diameter protruding. There was a sharp conflict in the testimony as to whether or not the hole existed. Some of the defendant's witnesses who had been familiar with the place for a number of years testified that photographs, which were exhibited, did not reflect the true condition of the place. Appellant complained of the lower court's exclusion of certain testimony which attempted to show by opinions of certain witnesses that the hole was "dangerous." The court said that it was a jury question as to whether or not the hole existed, and that the jury's verdict for the defendant answered that question. The court further observed that the lower

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[34] 204 Miss. 870, 35 So.2d 542 (1948).
[35] 202 Miss. 260, 31 So.2d 900 (1947).

court had properly excluded proffered testimony that the hole was dangerous.

In *City of Meridian v. Webb*[36] plaintiff recovered a judgment against the City of Meridian on account of personal injuries sustained when a horse ridden by the plaintiff fell through a bridge maintained by the city. It appeared that the horse ridden by the plaintiff was a medium sized animal, and also that the bridge had several defects in it, which had been reported to the city officials several weeks prior to the accident. There was other testimony that a number of complaints had been made to the city concerning the bridge. The court affirmed the judgment for the plaintiff, stating that the jury was warranted in believing that the city had not exercised reasonable care to maintain the bridge in a reasonably safe condition.

In *City of Columbus v. McIlwain*[37] plaintiff sued the City of Columbus to recover the value of property destroyed by fire through the neglect of the defendants in not extinguishing the fire. The two questions in the case were, first, whether or not the city was negligent, and second, is a city acting in a governmental or proprietary capacity in putting out a fire. The court announces the rule that in extinguishing fires a municipality is acting in a governmental capacity, and that in the operation of its water works it acts in a proprietary capacity. Plaintiff contended that the city in this case was acting in a dual capacity and that it should be held liable, if negligence was shown on behalf of its employees of the water department, since it operated the water department for a profit. The court further said that it made no difference that the city uses the same reservoirs and pipes for its fire service, that it uses for the distribution of water for profit.

In the case of *Owens v. Town of Booneville*[38] plaintiff sued the city for damages on account of injuries received by her in an automobile collision at an intersection in the city. The declaration charges that the city had carelessly permitted high weeds and bushes to grow up at the intersections of the streets, and that by reason thereof the view of persons entering the intersection was obscured. The court held that the city was not liable, and that a municipality is not under a duty to maintain the entire width of a street in condition for public travel, and that users of vehicles are not entitled to the use of the entire street from property line to property line.

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[36]38 So.2d 319 (Miss. 1949).
[37]205 Miss. 473, 38 So.2d 921 (1949).
[38]40 So.2d 158 (Miss. 1949).

AUTOMOBILES

In *Houston v. Holmes*[39] the question involved was whether or not a father who signs his son's application for a driver's license is liable for the negligent acts of the son. The court pointed out that under Code Section 8096 a parent who signs an application for a minor under the age of 17 years is liable for the negligence of the minor jointly with the minor, the negligence of the infant being imputed to the adult who signs the application. The point in this case was that when the license came up for a renewal, the father did not sign it, and the court held he was not liable for any acts committed by the minor, during the renewal period. Code Section 8114 provides that such license shall expire one year from the date of its issuance. It can thus be seen that this decision is an enlargement of the respondeat superior doctrine when the facts make it applicable.

The case of *Conley v. McCommon*[40] establishes no new rules.

In *Stevenson v. Robinson*[41] a verdict for the death of a child who was struck from behind by a truck was upheld as to liability, but remanded on the damage issue alone. A comparative negligence instruction which was not quoted was criticized by the court.

In *Davidian v. Wendell*[42] questions of liability in a case where plaintiff drives over a cross-over driveway into a one-way traffic lane are discussed. This case is a very good reference to keep in mind in automobile cases, as it sets out the number of feet per second an automobile will travel at certain speeds.

In the case of *Jackson City Lines v. Harkins,*[43] there was a collision between a Jackson City Lines bus and an automobile. A jury verdict for the defendant was affirmed. An instruction for the defendant to the effect that if the jury believed that the bus was operated at night, at such a speed as not to permit the driver to avoid striking vehicles coming within the range of his lights, and that this was the sole proximate cause of the collision, then it should find for the defendant, was held to be correct.

In *Koestler v. Burton*[44] plaintiff was following a bread truck at night through a residential section and ran into the back end of the truck when the driver stopped suddenly without giving a hand signal. A jury verdict for the plaintiff was affirmed, the court saying that it was a jury question as to whose negligence was the proximate cause of the accident.

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[39] 202 Miss. 300, 32 So.2d 138 (1947).
[40] 33 So.2d 306 (Miss. 1948).
[41] 37 So.2d 568 (Miss. 1948).
[42] 37 So.2d 570 (Miss. 1948), *suggestion of error overruled,* 37 So.2d 771 (Miss. 1948).
[43] 204 Miss. 707, 38 So.2d 102 (1948).
[44] 41 So.2d 362 (Miss. 1949).

In *Wallace v. Billups,*[45] a suit for damages for personal injuries was brought as a result of a collision between an automobile and a truck, which occurred one night about nine o'clock. Plaintiff offered a witness in chief to prove that grease spots were seen by him about seven o'clock the next morning in the north lane of the highway, and that scratches and skid marks extended from said spots in a southwestern direction.

This testimony was excluded, but the supreme court held that under the facts of the case the testimony should have been admitted, since it was not shown that the grease spots and other marks were made by a wrecker at the scene or any other automobile.

Carriers

Railroads

In the case of *Illinois Central Railroad Company v. Gatis*[46] plaintiff was a guest in a car which collided with one of defendant's trains. The declaration alleged there was a hole in the track of defendant where a plank had worn out or torn off, leaving a cavity about 4 or 5 inches deep, which caused the automobile to stall at the crossing. Photographs of the scene were admitted in evidence, which did not show any hole or depression. The court stated that in view of the photographs, there was insufficient evidence for the jury on the question of whether or not the railroad had maintained the tracks in a reasonably safe condition for public travel. A verdict for the plaintiff was reversed.

In *McClellan v. I. C. R. R. Company*[47] plaintiff, with permission of the train conductor, assisted a passenger in putting luggage on the train, and before he finished the train began to move, and the conductor told him that he could get off. The porter then opened the door and told him to jump. The court held that the railroad owed him the duty not to start the train until he had time to get off, since the conductor knew why he had entered the train, and that he intended to get off before it left the station. This case lays down the law for the first time in this state to the effect that one who boards a train to assist a passenger is entitled to have a reasonable opportunity to render such assistance and to leave the train, especially where the persons in charge of the train know why said person is on the train. The court said it was a question for the jury to determine whether or not the act of the railroad man in not raising the trap door to permit plaintiff to alight from the bottom step was a direct contributing cause of his injuries.

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[45]203 Miss. 853, 33 So.2d 819 (1948).
[46]202 Miss. 624, 31 So.2d 902 (1947).
[47]204 Miss. 432, 37 So.2d 738 (1948).

In *I. C. R. R. Company v. McNeil*[48] the plaintiff brought suit against the railroad for injuries received from running into an engine which was standing upon the main street in the City of Forest. The proof showed that no lights were burning on the engine, and no employees were present on or about it, and that it had been obstructing the crossing for about 15 minutes. This case is distinguished from several former similar cases in that the court said the railroad failed to prove that it was occupying the crossing in pursuit of its legitimate business purposes, and a verdict for the plaintiff was affirmed.

In *New Orleans & N. E. R. Company v. Elias*[49] the court holds that a negligence suit against an initial carrier of an interstate shipment of rice for damage to it does not have to allege affirmatively a compliance with the requirements of the Carmack Amendment to the Interstate Commerce Act[50] in as far as filing a claim with the carrier within the nine months prescribed period is concerned.

In *Alabama Great Southern Railroad Company v. Martin*[51] one of the defendant's trains struck the plaintiff's automobile at a private crossing. It appeared that the engineer gave a proper signal for the crossing, and that as he approached the crossing, the lights of an automobile headed west on the highway blinded him until the train and car had passed, and that immediately after the automobile lights ceased to blind him, he saw the other car for the first time upon the track, and he immediately applied his brakes, and did everything he could to stop. The court held that the train's speed of sixty miles per hour at the crossing was not negligent and was not unlawful, and that the only ground of liability would be that the engineer did not use reasonable care to detect the automobile upon the tracks, and in time to stop and avoid the accident. The court stated that the evidence did not show that the lights on the stalled car were burning at the time that it was struck by the train.

Busses

In *Meridian City Lines, Inc., v. Baker*[52] plaintiff was a passenger in a car driven by Wilson. The car collided with a tree which projected 2.7 feet into the travelled portion of the street in Meridian. Plaintiff charged that the city was negligent in maintaining the street with a dangerous obstruction, and charged that the Meridian City Lines driver failed to dim his headlights when meeting the Wilson car, and failed to turn the bus reasonably to the right of the center of the street, causing Wilson to

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[48] 205 Miss. 807, 39 So.2d 490 (1949).
[49] 205 Miss. 658, 39 So.2d 274 (1949).
[50] 49 U. S. C. § 20 (11) (1940).
[51] 205 Miss. 851, 39 So.2d 501 (1949).
[52] 39 So.2d 541 (Miss. 1949).

run into the tree. He charged Wilson with failing to stop his car when blinded by the bus lights. The jury returned a verdict against the city and bus line, but in favor of Wilson. On appeal, the case was affirmed as to the City of Meridian, and reversed as to the Meridian City Lines. The case was reversed as to the Meridian City Lines on account of erroneous instructions granted the plaintiff. The case also points out the correct form of a jury verdict. The first verdict of the jury was as follows:

> We, the jury, find for the plaintiff against Meridian City Lines, $3,500, and against City of Meridian, $3,500, a total of $7,000.

The court declined to accept this verdict and sent the jury back in view of the rule there is no apportionment of damages against tort-feasors in Mississippi.

The jury retired and then returned the following verdict:

> We, the jury, find for the plaintiff as against Meridian City Lines, Inc., and City of Meridian, defendants, and assess his damages at $7,000, ($3,500 each). We, the jury, find for the defendant, Louis Wilson, not guilty of any negligence.

The court then entered a judgment against the two named defendants, jointly and severally, in the amount of $7,000, and discarded as surplusage that portion of the verdict which read "($3,500. each)." On appeal the appellants argued that the last verdict was still an attempt on the part of the jury to apportion the damages, but the supreme court upheld that the trial court was correct in accepting the general verdict for $7,000, and disregarding as surplusage any attempt of the jury to apportion the amount equally between the two defendants.

Mines and Minerals

In *General Geophysical Company v. Brown*[53] plaintiff sued for damages for destruction of a water well and loss of time in obtaining water elsewhere, by the use of explosives used in geophysical explorations. The declaration charged that the defendants went on plaintiff's land and made the explorations without authority to do so, and negligently damaged his land. The testimony showed that the first time the test shots were made, no permission was obtained from the land owner, and that several days later, the land owner's wife gave the defendants limited authority to make tests, but cautioned them not to go near the plum orchard where they had

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[53]205 Miss. 189, 38 So.2d 703 (1949).

been before. It further appeared that the second explosion was at the very place where she told them not to be.

On the trial of the case, the defendant argued that no negligence was shown, but the court held that since the acts were done without initial authority, the defendants were trespassers and that they were liable without regard to the degree of care used.

Landlord and Tenant

In the case of *Hotel Markham, Inc. v. Patterson*[54] Patterson, who rented a barbershop from the defendant, sued for actual and punitive damages as a result of the hotel's refusing to admit him to the barbershop premises and renting the same to another person. The court held that Patterson was a tenant and not a mere licensee. The shop was closed and another tenant was moved into it by the hotel without giving Patterson actual or statutory notice required by Code Section 946. The court held that the owner of the property should have given the tenant notice before changing the lock on the premises and moving in a new tenant.

In *Roell v. Brooks*[55] an owner of a building sued the tenant for damages caused to the building by fire. It appeared that the manager of the store closed at about six o'clock P. M. and went home for supper, intending to return to work after his meal. He left a gas heater burning, as had been his custom. During his absence, the building caught on fire and was damaged. Suit for damages was brought under Code Section 898. The lease contract provided that the lessee agreed to keep the interior of the premises in as good repair as the same were at the time of the commencement of the lease. The court held that under the above statute the tenant was not liable for damages to the building unless it could be shown that the tenant did not use reasonable care in the maintenance of a reasonably safe gas heater and that such failure was the proximate cause of the fire.

Damages

The writer will include several cases discussing the question of damages with the thought in mind that this may or may not be thought to be a good part of "Torts."

In *Montgomery Ward and Company v. Nickens*[56] the court held that, in a suit by a married woman for damages, the amount of medical bills paid by her on her own behalf and credit can be recovered by her individually. The defendant claimed that she should not be permitted to re-

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[54]202 Miss. 451, 32 So.2d 255 (1947).
[55]205 Miss. 255, 38 So.2d 716 (1949).
[56]203 Miss. 195, 33 So.2d 815 (1948).

cover these bills because her husband was liable for the necessities of the wife.

In *Gill v. Eakin*[57] it is interesting to note that the supreme court remanded the case because the damages awarded the plaintiff below were not adequate.

In *Central Cab Company v. Morrison*[58] the court pointed out the importance of sending up with the record the photographs and X-ray photographs in a personal injury case.

In the *Koestler* case[59] the defendant complained of the admission in evidence of a photograph of the plaintiff which had been taken several years prior to the trial of the case. This photograph showed the plaintiff as he looked prior to the injuries received in the wreck out of which the lawsuit grew. The court held that the introduction of the photograph was not reversible error due to the fact that the plaintiff had numerous injuries other than facial disfigurement. The court did not repeat the rule in Mississippi to the effect that facial disfigurement is not a ground for awarding damages in this state. It was pointed out, with which the writer agrees, that in some cases permanent facial disfigurement can be a very serious damage. But the court said that in view of prior decisions it could not allow damages for facial disfigurement. It seems that this rule should at least be changed so that if a person who has suffered facial disfigurement can prove damages proximately resulting therefrom, he should be entitled to recover for them; for example, movie actresses, public speakers, models, teachers or ministers might be very greatly damaged if they suffered serious and ugly facial disfigurement. It is reasonable to assume that the court's reluctance to change this rule probably is based upon the doctrine in Mississippi that there can be no damages recovered for permanent scars unless they are accompanied by pain.

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[57]203 Miss. 204, 33 So.2d 821 (1948).
[58]204 Miss. 771, 38 So.2d 93 (1948).
[59]*Supra* note 44.

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TRUSTS AND WILLS

*C. Sidney Carlton**

During the period covered by this study there has been a rather large number of cases decided involving will and trust questions. Many of these are not discussed in this article, but an attempt has been made to analyze the more interesting and important ones. The cases involving trust questions are first discussed.

Triplett v. Bridgforth[1] is a suit involving several points, only one of which is pertinent to this subject. It was held that the statute of frauds was not available as defense to an action to set aside a trustee's sale under a deed of trust, when the bill alleged that the complainant relied on the defendant's promise to buy at the foreclosure and later convey to the complainant; that because thereof, complainant did not prevent the foreclosure; and that the defendant, after purchasing at the foreclosure, claimed it as his own.

In the case of *Burton v. Gibbs*[2] a general demurrer was sustained to the bill of complaint and the complainant appealed. The bill alleged that some of the defendants received all the cotton from the land of complainant and thereby collected sufficient money to pay all instalments due on a trust deed in which the Federal Land Bank of New Orleans was beneficiary. It was further charged that the defendants breached their fiduciary duty and wrongly contrived to procure the foreclosure of the deed of trust, thus enabling one of the defendants to purchase the property. It was held that on demurrer the bill stated a cause of action to have the deed set aside and the purchasing defendant declared the holder of the property as trustee for the complainant. Since ten years had not expired after the receipt of the deed by the purchasing defendant, the statute of limitations was held not to have barred the right of action.

These cases differ from *Wilson v. Martin*[3] which tells us that an oral contract to convey land, even if amounting to an express trust, is within the statute of frauds and not binding.

In *Kelly v. Wilson*[4] a deed was the subject of the controversy. It conveyed certain lands to the trustees of a particular school for so long as the land was used for school purposes. The acknowledgement on the deed

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[1]205 Miss. 328, 38 So.2d 756 (1949).
[2]204 Miss. 248, 37 So.2d 285 (1948).
[3]204 Miss. 196, 37 So.2d 254 (1948).
[4]204 Miss. 56, 36 So.2d 817 (1948).

was defective, and the argument was made that the conveyance was one creating a trust in lands and it was within the statute[5] requiring that all declarations or creations of trusts in land be in writing, be acknowledged, and be filed for record. The court held that the instrument was good between the parties despite its defective acknowledgement; it did not create a trust in lands. The estate conveyed was said to be a fee simple defeasible and as such was valid.

It was held in *Ryals v. Douglas*[6] that when the wife furnishes the money for the purchase of property and the deed inadvertently is made to the husband, the wife is entitled to enforce a resulting trust in her favor.

In Re *Hart's Estate*[7] states as the rule applicable to the operation of trust estates, that a court of equity will not order the sale of trust property and reinvestment of the proceeds merely for the purpose of increasing the value of the estate, but will do so to effectuate the purpose of the trust or to prevent loss or destruction of the trust estate.

We do not find, however, that the court is unsympathetic to the problems arising in the administration of trusts. *Merchants Bank and Trust Company v. Garrett*[8] is a case in which the income from a trust estate was insufficient to carry on the purposes of the trust because of a change in conditions subsequent to the declaration of the trust. It was shown that the purposes of the trust would be defeated unless the corpus was used. Such use was not authorized by the trust declaration.

The court held that under these circumstances the income might be supplemented by such a portion of the corpus as is necessary to effectuate the trust purposes.

The will cases which were decided by the court during this period follow, in some measure, the usual run of cases. Several involve factual situations in will contests. These have not been discussed in this article because of the fact that such factual patterns rarely if ever are repeated.

One of the most interesting cases is that of *McKay v. Lemly*,[9] in which the decision of the lower court was affirmed by an equally divided court on appeal. The question involved was, indeed, a close one, but, deferentially, the writer agrees with the result reached.

The testator was living with his deceased wife's sister at the time of the making of the will. At that time the sister was suffering from an incurable disease and her death was merely a matter of time.

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[5]Miss. Code § 269 (1942).
[6]205 Miss. 695, 39 So.2d 311 (1949).
[7]40 So.2d 263 (Miss. 1949).
[8]203 Miss. 182, 33 So. 2d 603 (1948).
[9]40 So.2d 281 (Miss. 1949).

Under his will he left to this spinster sister-in-law a life estate in his property. In the next item of his will, he provided in great detail and at some length for the disposition of his property "if at my death Miss Elizabeth Cary Lemly (the devisee of the life estate) shall be dead."

The testator's provision for disposition of his property was not to his heirs alone. Inasmuch as he preceded Miss Lemly in death, the question for decision was whether or not his heirs at law inherited upon the death of Miss Lemly or whether, under the language of the will, the legacies and bequests contained in Item 2 should become effective.

In other words, it would appear that the decision became one as to whether or not the testator intended his carefully arranged and lengthily detailed division of his property to depend upon the fortuitous happening of whether or not he preceded Miss Lemly in death. In the language of Judge Alexander, in his concurring opinion:

> No one was to enjoy the estate in fee until the death of Elizabeth Cary Lemly. The time of her death, as pointed out in the controlling opinion, could not have been intended to be a precedent condition to this distribution. To hold otherwise would impute to the testator a purpose to put these objects of his bounty in pawn, to wager their heritage upon the caprice of an hour glass.

The dissenting opinion places reliance on the case of *Simpson v. Watkins*.[10] The writer respectfully submits, however, that such case is distinguishable from the case at bar, though the rule there stated be correct:

> It is true that in arriving at the intention of the testator we are bound by the words which he has employed; but the true meaning of that expression is that we must look at the whole will and to the words used therein—to the complete purpose and plan of the entire document.

The dissenting opinion objects to the introduction of the testimony relative to the condition of the health of Miss Lemly and to the testimony showing the relationship of the testator to the devisees and legatees under Item 2, which was used by the controlling opinion to show the testator's plan of distribution.

The writer respectfully submits that such evidence is not the type contemplated in the *Simpson* case and is not the type of testimony which

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[10]162 Miss. 242, 139 So. 400 (1932).

should be and is objectionable in determining testamentary intention. It is submitted that there is a line of demarcation between testimony attempting to show the intention of the testator actually based upon his personal relaionships with particular objects of his bounty, and testimony calculated to show the circumstances in which the testator found himself at the time of making his will. Intention is a mental state and a mental state is always formed partly as a result of and partly in relation to the circumstances of the testator. Those circumstances are susceptible of precise proof. Proof of those circumstances is properly proof indicating the meaning of the language used in the will. It is not used in ascertaining the intention per se.

One case in which a factual situation is discussed at length is that of *Blalock v. Magee,*[11] and it is interesting for a study of the court's discussion of the particular evidence involved. Also of value in this case is the holding of the court that lay witnesses are competent to testify as to their opinion of the mental incapacity of the testatrix, when they first give the facts upon which their opinions are based. It was further held that the refusal of an instruction to find for the proponents of the will on the question of undue influence did not constitute reversible error, although the evidence did not sustain a finding of undue influence. The reasoning of the court was that there was ample testimony to sustain the verdict of the jury on the issue of incapacity to make a will and that, therefore, there was no will and the issue of undue influence became immaterial. Judge Roberds dissented, believing that the leaving of the question of undue influence to the jury might have influenced the jury's decision or might have formed the basis for its decision. The writer submits that the position of Judge Roberds is certainly safer than the majority opinion. Leaving both issues to the jury leaves more room for compromise in its deliberations and the writer feels that compromise has no place in the jury room.

In the case of *Dantone v. Dantone,*[12] a mother devised certain property to two of her children, one of whom was named executrix by the will. Subsequent to the execution of the will, the mother conveyed the property to the two persons named as devisees. The novel position was urged that the executrix, by qualifying as such, elected to take under the will and that she could not therefore take under the deed, that such taking would be against the will. The court held that the doctrine of election did not apply; that the conveyance of the property subsequent to the making of the will did not revoke the will *pro tanto* as to all property devised, but only as to the particular subject of conveyance by the deed.

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[11]205 Miss. 209, 38 So.2d 708 (1949).
[12]205 Miss. 420, 38 So.2d 908 (1949).

The case of *Bailey v. Sayle*[13] involved a suit between a devisee and the executor of an estate in which the will of the testator was filed with the chancery clerk and recorded without petition for probate, the issuance of letters testamentary, or the giving of notice to creditors. The one named as executor in the will took possession of all the property of the estate and acted as an executor though his position was that of an executor *de son tort*. The filing and recording of the will took place in February 1920. No accounting had been made and the defense in the court below was a plea of the statute of limitations and of laches.

It was held that the statute of limitations does not run against an executor with respect to legacies until there has been a final settlement or a disavowal of the trust imposed. The fact that the will relieved from accounting did not change the rule and did not permit the statute of limitations to begin to run. The court further held that under the facts of this case, the legatee was not guilty of laches and the suit was entertained for the legacy of the complainant.

In *White v. Hesdorffer,*[14] it was declared that an executor is an assignee of the testator for the purpose of enabling the executor to appoint a substituted trustee in a deed of trust when that instrument authorized such appointment by the beneficiary (the testator here) or his assigns.

The case of *Denson v. Denson*[15] is one in which the court sought to do equity and it would appear that this case and others consistent therewith can be explained and justified only on that basis. Here a father was heavily indebted. He asked each of his numerous children to assist him in working out of his plight. Only one found it agreeable to do so. The father promised that if this child would help him, his property would be left to that child. This son deprived himself and his family of conveniences for a long period of years and by dent of privation and hard work paid off all of his father's indebtedness. In appreciation the father made a will leaving the property to that son. This will was later removed from the bank by the father and its whereabouts were unknown. The court held that the father could not, under such circumstances, be allowed to have destroyed the will, and it was therefore admitted to probate.

Gill v. Johnson[16] is a continuation of previous litigation before the supreme court, and the issues raised were by way of an action of ejectment by certain devisees against the successor of a purchaser at a judicial sale of the devised property.

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[13] 40 So.2d 618 (Miss. 1949).
[14] 202 Miss. 711, 32 So.2d 442 (1947).
[15] 203 Miss. 146, 33 So.2d 311 (1948).
[16] 40 So.2d 600 (Miss. 1949).

On October 13, 1938, an instrument alleged to be the last will and testament of the deceased was filed. On October 26, 1936, letters of administration were issued to the widow without regard to the will. There was a contest of the will and much protracted litigation relative thereto. The will was finally established on March 29, 1943, and the executrix qualified thereon by giving of the required bond on May 3, 1943. During the contest the widow continued to act as administratrix and, pursuant to proper court order, sold the property in question on November 8, 1941.

The question of interest here is whether or not the action of the administratrix in making the sale of the property was absolutely void or only voidable.

The writer thinks that the decision was correctly made; that such action was not void, although some of the reasoning may necessarily be a bit strained. It was held that the court authorizing the sale had jurisdiction pursuant to the constitution[17] and that under the temporary administrator statute,[18] the acts of the administratrix should be upheld.[19]

The case of *Old Ladies Home v. Cooper*[20] involves the construction of a will to determine the intention of the testator. The will contained an erroneous description referring to twelve lots in Block 3 of Oak Ridge Subdivision in the City of Clarksdale, naming the lots by number.

Lots 2 and 3 of Block 3 of that subdivision had been subdivided into the Melrose Place Subdivision. Block 3 of the Oak Ridge Subdivision contained only eleven lots, the numbers of which coincided in only three particulars with the numbers of the twelve lots described in the will. The testatrix actually owned twelve lots numbered as shown in the will in the Melrose Place subdivision.

It was held that the error in the description was apparent on the face of the will and that no parol evidence was necessary to show such mistake—and if necessary would be inadmissible. It was further held that by elimination of the specific numbers of the lots in the will, sufficient description remained to identify the twelve lots in Block 3 of the Oak Ridge Subdivision actually owned by the testatrix, such lots being subdivided lots of the original lots. The will, therefore, was susceptible of construction to determine the intention of the testatrix and the title to the lots passed by the will.

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[17]Miss. Const. § 159.
[18]Miss. Code § 520 (1942).
[19]21 Am. Jur. §§ 128, 165.
[20]40 So.2d 268 (1949).

Two companion cases of interest are *Klein v. Gaines*[21] and *Gaines v. Klein*.[22] The testator executed a will and later wrote a holographic codicil. Some language in the codicil was confusing as to the extent of its revocation of the will. The decision on that issue turned on the principle that a codicil can work as a revocation only to the extent that it either expressly or by necessary implication modifies the former testamentary dispositions. A revocation must be equally as clear as the original devise or bequest.

Specific devises of certain property were made while other devisees were made the residuary beneficiaries. The executor collected the rents from the specific bequests accruing subsequent to the testator's death, and it was claimed that the debts of the estate should be paid from such rents rather than from the residuum because of the provisions of the statute.[23]

The court held that the rents were subject to payment of the debts of the estate, but that they should be so subjected only after exhaustion of the residuum. Such rents belonged to the respective specific devisees. Apparently the question was one of first impression in the precise application of the statute.

Everett v. Dockery[24] is important as a case involving the construc-
Miss. 125, 33 So.2d 832 (1948).
tion of a will and the language used therein. The will involved was holographic. The testator's property was divided between his son and his daughter for life and then to their children. It was specifically stated that "should either child die without issue, the surviving child or child's children shall inherit the property of the other." Subsequent to the execution, testator's daughter adopted children with the approval of the testator because of advice by competent medical counsel that the daughter was unable to have children of her own. The question then became whether or not, in the light of such knowledge by the testator, the use of the word "issue" included adopted as well as natural children. The court held that in usual lay usage the word did not include adopted children; that it must have been the intention of the testator, therefore, not to include adopted children. Had the will been executed after such knowledge by the testator and his approval of the adoption of such children, it is the belief of the writer that the opposite conclusion should, and probably would, have been reached.

We refer next to two cases involving the renunciation of a will by the surviving spouse. In the first case, *Stringer v. Arrington*,[25] the widow

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[21]203 Miss. 871, 34 So.2d 488 (1948).
[22]203 Miss. 271, 34 So.2d 489 (1948).
[23]Miss. Code § 539 (1942).
[24]203 Miss. 125, 33 So.2d 313 (1948), *suggestion of error sustained in part*, 203
[25]202 Miss. 798, 32 So.2d 879 (1947).

was living apart from her husband at the time of his death. Within a few days after the separation, the testator disinherited her by his will. It was contended that by virtue of her separation she was not entitled to renounce the will and share in the estate. It was the holding of the court, however, that since the evidence showed that she was justified in living separate and apart from the husband at the time of his death, she was entitled to renounce the will and take under the statute.[26]

In the case of *Davis v. Miller*,[27] the renunciation was by the husband, and several different formulae were urged to the court as proper ones to use in determining the share to which the surviving spouse was entitled upon renunciation. It was stated that since only one formula was reasonable and gave meaning to the statute, that such formula was the correct one. When a couple is childless or has only one child, the share of the spouse renouncing the will is computed by dividing the deceased spouse's estate by two and subtracting from the quotient the amount of the separate estate of the surviving spouse. The remainder is the deficiency to which the survivor is entitled and which must be made up from the estate of the deceased.

One of the most difficult cases decided by the court in the matter of the construction of wills during the period covered by this article is the case of *Campbell v. Cason*.[28] The writer was one of numerous counsel in the case and perhaps that accounts for his feeling in this regard. The will was written by the testator without the benefit of counsel. One clause becomes humorous in the light of subsequent developments:

> I hope that all of you will go to God with your misunderstandings, if there be any, and not to the Courts, for if you do this God will help you to solve your problems, and the lawyers, and court will only take your moneys and leave you without anything.

The widow renounced the will, and in the ensuing legal tangle there were involved nine lawyers representing seven different clients. The testator left one adopted son and his widow as his heirs at law. He provided for them and left other bequests to near relatives, including his aged father. The widow was dissatisfied with her share of the estate and renounced the will, electing to take under the statute.

Only a few of the problems resulting from this situation will be discussed here. No discussion appears to be necessary as to the result

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[26]MISS. CODE §§ 668, 669 (1942).
[27]202 Miss. 880, 32 So.2d 870 (1947).
[28]40 So.2d 258 (1949).

effected, generally, by this renunciation. The widow was entitled to one-half of the net estate, and as to her, the testator died intestate.[29] Two pieces of property owned by the decedent were security under separate deeds of trust for certain indebtednesses of the testator. The owner of one indebtedness probated his claim. The owner of the other indebtedness refused to probate that indebtedness. The question raised thereby was whether or not the widow was entitled to exoneration of her share from these indebtednesses, particularly in view of the provision in the will directing payment of all properly probated debts "except secured debts not due."

Pursuant to the doctrine announced in *Howell v. Ott,*[30] the court held that in the absence of the probate of a secured debt, the widow was not entitled to have her interest in the property exonerated. On the other hand, it held that upon probate of the other debt, its payment was required regardless of the provision in the will prohibiting payment of secured debts not due. The writer believes that this position relative to the payment of probated, secured, not due debts is correct and that the widow was entitled to exoneration of her interest in the property securing such debt. As to that particular property, the widow took a one-half interest. The result of the payment of that debt was the exoneration of the son's one-half interest contrary to the provisions against payment of such indebtedness. Consequently, in order that the interest of the son might be that which was contemplated in the devise to him, the writer feels that the court should have charged one-half of the amount so paid against his interest in the remainder of the estate. This, however, was not done and we believe that thereby the court failed to give effect to the testator's intention.

The next problem which we believe justifies discussion here arises out of the establishment of a trust in the will. The testator left certain cash funds on hand which were called the "general fund." He left other cash funds, being the proceeds of a specific life insurance policy, subject to certain trust provisions with a proper appointment of a trustee to administer the same. These funds were spoken of as the "trust fund."

The renunciation by the widow raised the question relative to these funds as to whether she was entitled, by her renunciation, to one-half of the trust fund and one-half of the general fund, or whether she was entitled to one-half of the total cash funds, being the total of the "general" and the "trust" funds.

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[29]Gordon v. James, 86 Miss. 719, 39 So. 18 (1905).

[30]182 Miss. 252, 180 So. 52 (1938), *suggestion of error overruled,* 182 Miss. 252, 181 So. 740 (1938).

The trust fund, as stated, was disposed of in a specific manner. The general fund was disposed of by the residuary clause. If the widow, by her renunciation, took one-half of each of the two funds, the loss occasioned by her renunciation would fall upon the legatees who were not heirs at law, but if she took only one-half of the total, then the residuum would be required to be first abated and the loss would fall upon the share of the adopted son.

Some language in the case of *Gordon v. James* indicated that renunciation entitled the widow to share equally in each and every individual part of the property, as well in each and every item of personalty as in each and every item of realty, but in that case no attempt was made to divide cash into two different parcels of personalty as the widow attempted to do in the case at bar.

The decision of the court was that all the cash assets would be totalled and the widow would take one-half thereof and that any abatement caused thereby would fall upon the residuum. On this point, the case seems to be one of original impression.

The court, we believe, used rather loose language in classing the beneficiaries under the trust fund as "specific legatees." It is very doubtful that persons bequeathed a specific sum of money are "specific legatees" as the legacy is not of a specific thing.

State Bar Section

The following articles by members of the Mississippi State Bar represent contributions not written specifically for publication in the *Mississippi Law Journal* but which, because of their special interest to Mississippi lawyers, are published here. In accordance with its policy of seeking to encourage writing on legal matters by members of the Bar, the *Journal* will welcome an opportunity to publish any items of sufficient and general interest.

SOME ODDITIES AND VAGARIES IN JUDICIAL AND LEGISLATIVE HISTORY

*L. A. Smith, Sr.**

Mayes Inn of Phi Delta Phi, honorary legal fraternity at the University of Mississippi, affectionately known far and wide as "Ole Miss," honored me by requesting that I address its members and their guests on the occasion of a banquet given the 1949 initiates, and I chose for my topic the subject of this article. Subsequently, by special request I also used it as my theme in addressing the Hinds County Junior Bar Association. Many members of these two groups thought more highly of my treatment of the matter than I do, and the officials of the *Mississippi Law Journal* have complimented me by asking that I permit its publication in that law magazine. This I have consented to do, but I must confess it is with much diffidence that I thereby risk the views of a wider and perhaps more critical audience.

Treatment of a subject in an oral address is quite different from its discussion in written form. As an illustration of an incidental difference between a spoken and a written discussion, I might call attention to a predicament in which a young lawyer found himself, with reference to his argument in chancery court when I was chancellor. His case was predicated upon the validity of a common-law marriage. I had ruled that he had convinced me of the validity of the common law marriage involved, that he need not argue it, and that I would hear from his opponent later on that point if his opponent desired to be heard further. Thereupon he exclaimed: "If the court please, I have written my speech, memorized it, practiced it before a mirror, common law marriage runs all through it, and if I can't talk about common law marriage, I can't make no speech."

Another anecdote in which this same young attorney figured is this: He had a midwife client who could not collect for her services, and employed him to collect for her. He brought me the code, stating he had found and read the statutes giving liens on the off-springs of bulls, stallions, and jack-asses, but could find none giving a lien on the baby in the

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*Associate Justice of the Mississippi Supreme Court.

case of a midwife. I, as gently as possible, called his attention to the fact that slavery had been abolished in this country, and there could be no such lien. He said: "There just ain't no justice no more."

Courts and Laws

Decisions of courts are generally regarded, along with legislative enactments, as prosaic, humdrum affairs without popular appeal. They should not be so regarded. Both reflect matters of the utmost historic significance, and both disclose the advance of enlightenment as well as escape from earlier ignorance and queer phases of public attitudes and social and business customs. They also reveal ideas of domestic relations changing with the years, emancipation of women, great political contests, episodes in the lives of the great and near-great, the impact of the freeing of slaves upon the traditional way of life and litigation in the South, liberalization of divorces, growing concern for children and persons of unsound mind, commercial and industrial expansion, diversification of crops, the growth in importance of the timber and lumber business, and the mining of oil and gas. Tragedy and comedy, pathos and rascality, scandal and nobility, poverty and wealth, politics and statescraft, all play their part in the constantly changing drama of life reflected in the opinions of appellate courts, and the statutes enacted by legislatures and ordinances passed by municipal boards. It is from this point of view that I present to you some of the oddities and vagaries of judicial and legislative history.

However, my remarks are not addressed alone to the tragedies or comedies or social or political aspects, but to the oddities and vagaries of the law, with some statistical data, too, and with a few humorous court room scenes.

It is important that we maintain respect for the law, because it is for the government of the people, whereby is sought the greatest good for the greatest number. Above all things to be avoided is cynicism, and my remarks are not to be construed as cynical, because I deal only with the curious and the occasional eccentricities of interpretations of the law, and the enactment into statutes and ordinances of well-intentioned but misguided provisions for regulating the conduct of citizens.

Aristotle wrote that "Law is a form of order, and good law must necessarily mean good order."

Edmund Burke said, "There are two and only two, foundations of law: equity and utility."

A cynic's definition of law, on the contrary, is ascribed to Aaron Burr, who declared that "Law is whatever is boldly asserted and plausibly maintained."

Cicero, a great Roman lawyer, said, "The laws place the safety of all before the safety of individuals."

In his "Table Talk," John Selden was of the opinion that "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him."

But this same author rather satirically paid his respects to chancellors, when he said: "Equity is a roguish thing; for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience."

Having been a chancellor for nine years, and having served on the supreme court for four and a half years, and there reviewing decisions of chancellors, I want to assert that it is not true in Mississippi.

My preference is for this from Thomas Hobbes: "All the sentences of precedent judges that have ever been cannot altogether make a law contrary to natural equity."

However, I now pass from generalities to the specific illustrations and incidents of my subject matter.

Husband's Right to Whip His Wife

An interesting case, which the good ladies will instantly condemn, is one where it will be found that the Supreme Court of Mississippi held in 1834 that by the ancient common law the husband possessed the power of chastising his wife, since he was responsible for her misbehavior. Hence it was thought reasonable to entrust him with the power necessary to restrain the indiscretions of one for whose conduct he was made answerable. Mr. Justice Powatan Ellis said in the opinion of the court:

> To screen from public reproach those who may thus be unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[1]

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[1]Bradley v. State, 1 Walk. 156 (Miss. 1824).

This was the application of the old common law which began in the reign of Charles I of England, but which the court said could not be abandoned without entrenching upon the rightful authority of a husband known and acknowledged from the earliest periods of the common law.

However, I am happy to be able to say that this barbaric relic of a crude by-gone age was later repudiated by the Supreme Court of Mississippi in 1893. It then said:

> The suggestion in the evidence of a belief amongst the humbler classes of our colored population of a fancied right in the husband to chastise the wife in moderation, makes it proper for us to say that this brutality found in the ancient common law, though strongly recognized in *Bradley v. State,* has never since received countenance, and it is superfluous to say now that the blind adherence shown in that case to revolting precedent has long been utterly repudiated in the administration of the criminal law in our courts.[2]

The Longest Reported Opinion

The longest reported opinion in the Mississippi Supreme Court Reports comprises 259 pages, being entitled, *State of Mississippi v. Hezron Johnson.*[3] The 39 syllabi required five full pages. The opinion itself was 259 pages long.

The case dealt with the Mississippi Union Bank, its charter and stockholders, one of which was the State of Mississippi. This decision was rendered at the April 1853 term of the supreme court. The suit was to recover the amount of a state bond, acknowledging its indebtedness to the Mississippi Union Bank. The state's defense was that the bond was not the bond of Mississippi, nor was she bound under her constitution to pay the same, and that it did not constitute a just or legal and constitutional claim or demand, in favor of claimant against the state. The state lost the decision in the lower court, which was affirmed on appeal. A petition for a rehearing was filed by Daniel Mayes on behalf of the state. He was the father of Judge Edward Mayes, a former chancellor and professor of law at the University of Mississippi, and for whom Mayes Inn of Phi Delta Phi is named.

Daniel Mayes was from Kentucky, and had been professor of law at Transylvania University before migrating to Mississippi at the time of the Choctaw and Chickasaw cessions to the United States.

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[2]Harris v. State, 71 Miss. 462, 14 So. 266 (1894).
[3]25 Miss. 625 (1853).

Mississippi finally repudiated the Mississippi Union Bank bonds. Governor McNutt recommended this, but both Senate and House, at that time, declared in favor of payment. In 1841 the Whig party advocated payment, and the Democrats repudiation. The people elected the entire Democratic ticket on that platform. Democratic Governor Tucker then recommended payment of the Planters Bank bonds, but condemned the idea of the payment of the Union Bank's bonds, saying in his inaugural address:

> The transactions connected with said bank, both in its inception and final consummation, were not governmental, but were to the contrary individual actions, performed not only without authority of the constitution of the state, but contrary to the express provisions thereof; though, should the legislature feel under any obligation, either legal or moral (which I do not), or should deem it a matter of policy to discharge and should determine to assume or pay the liability, the constitution provided a method—an act pledging the faith of the state to be referred to the next legislature.

The legislature, largely under Governor Tucker's influence, on the 18th day of February 1842 repudiated the bonds.

Home Brew As Intoxicating

The Supreme Court of Alabama announced that they would take judicial notice that "home brew" means an intoxicating homemade beer.[4] The Supreme Court of Mississippi, in their greater innocence of the ways of "the world, the flesh, and the devil," and being, of course, wholly unsophisticated and totally ignorant of the characteristics of intoxicants, confessed that, accordingly, they could not take judicial notice that "home brew" is intoxicating, and required strict proof thereof. The court in its opinion had this to say:

> It is true that the jar of home brew was introduced in evidence in the case at bar. But it does not appear from the record whether the jurors either tasted or smelled it before or after they retired to consider their verdict, or as to how they may have otherwise determined its alcoholic content. Then, too, the defendant may have been entitled to have had such proof made in his presence and hearing, in order that he might avail himself of the privilege of cross-examinating the witness in that behalf. At any

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[4]Jones v. State, 17 So.2d 545 (Ala. 1944).

rate, we do not think the proof that this preparation was intoxicating liquor is sufficient to sustain this conviction.[5]

Verdict by Thirteen Jurors

This was a case in assumpsit, where the endorser of a note was sued, pleading the general issue, which the Supreme Court of Mississippi held was an admission of the character of endorser in which he was sued. But the odd thing about the case was the jury of thirteen men that tried it. There is no explanation, in the published report, of how there happened to be a jury of thirteen members. All that the opinion of the court had to say about it was this:

> The objection that the jury consisted of thirteen individuals, is not ground of error. A verdict by a less number than twelve, in issues of this kind, would be void, but a verdict of a greater number than twelve is not so on that account.[6]

Today, a lawful jury still consists of twelve members in the circuit court, but nine of that number may return a verdict, if so many agree to it.

The Mississippi Supreme Court Decision Containing the Most Citations

Justice Tarbell delivered the opinion of the Supreme Court of Mississippi which has the most citations. The court declared invalid an ordinance of April 29, 1868, passed by the Mississippi Constitutional Convention of that year, granting new trials upon certain classes of final judgments and decrees enumerated in the ordinance, on certain named conditions, on the ground that it was not a legislative but a judicial act, and therefore unauthorized and void.

The court held further that the separation of the legislative, judicial and executive powers of government is a fundamental principle of constitutional jurisprudence and cannot be violated even by a constitutional convention! In the course of its opinion the court referred to approximately 264 authorities, including Federal and state court cases, text books and treatises by many eminent legal writers. The opinion was rendered at the April term, 1873, and required 17 pages. The lower court was affirmed.[7]

Curiously enough, careful search does not disclose that this case has been cited in any subsequent opinion of the Supreme Court of Mississippi or any other appellate court in the nation.

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[5]Turner v. State, 198 Miss. 839, 24 So.2d 84 (1945).
[6]Tillman v. Ailles, 13 Miss. 373 (1846).
[7]Mary V. Lawson v. W. S. Jeffries, 47 Miss. 686 (1873).

Lotteries

It is scarcely known nowadays that the University of Mississippi was at one time the beneficiary of a regular lottery. But it is true, nevertheless. By an act of the legislature of 1867 lotteries were authorized. One in particular was established on the condition that it pay a certain percentage of its capital stock, and thereafter of its revenues, to the University of Mississippi. This lottery continued in existence for several years, but was finally held illegal by the Supreme Court of the United States. However, this decision followed the Mississippi Constitution of 1869, which prohibited lotteries. Yet we learn that lotteries were a favorite method of raising money for educational and charitable uses in the early days.[8]

Only Mississippi Supreme Court Judge Who Never Wrote An Opinion

There has been but one member of the Supreme Court of Mississippi who never wrote an opinion for the court during his entire tenure of office. He was Associate Justice Daniel W. Wright, who sat upon the supreme court bench from 1833 to 1838. His name is listed in both volumes one and two of Howard's Reports as an associate justice. The other associate justice at that time was C. P. Smith, while William L. Sharkey was chief justice.

Opinion Containing the Longest Sentence

The longest single sentence found in the Mississippi Supreme Court's published opinions required two full pages of the state reports. The sentence contains 711 words. There are no paragraphs, and of course no periods, but there is a liberal sprinkling of commas and semicolons. The case dealt with adverse possession and estoppel, and the long sentence presented the principal questions for decision. After it was all over, the decree of the trial court was affirmed on all points.[9]

A Cow Is Not a Person

Wilson was convicted of trespass. Quoting from the opinion of the Supreme Court of Mississippi:

> The conviction appealed from in this case is based upon the fact that the defendant [Wilson] had staked out a cow on his own premises in close proximity to a 'chicken wire' fence on the

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[8]Stone v. Mississippi, 101 U. S. 814 (1880).
[9]Kersh v. Lyons, 195 Miss. 598, 15 So.2d 768 (1943).

line of the adjoining lot of the prosecuting witness, and permitted the cow to damage the fence.

The prosecution was founded on Section 2406 of the Code of 1942, providing punishment for "any person" committing a wilful trespass on the property of another; or Section 2411 providing punishment of "any person" going upon the enclosed ground of another after being warned by such other, or his agent, not to do so, or remaining after being requested to depart.

I quote from the opinion:

> The cow was not a person within the meaning of these statutes, nor was it shown under the latter statute that she remained on the land of the prosecuting witness after having been requested 'to depart.' Then, too, the prosecution is not against her. Moreover, the undisputed facts in the case do not show or substantially tend to show that the owner of the cow was guilty of a crime under either of these statutes.

The judgment of the trial court was reversed, and the defendant discharged by the supreme court.[10]

An Unfortunate Bull

An unfortunate bull was involved in a case where the Supreme Court of Mississippi held that when a person in response to a call from a woman, who had been chased by bulls, shot them, killing one and maiming the other at a time when they were not engaged in any act of viciousness or violence, he was liable in damages, since one may not shoot a valuable domestic animal in punishment for a wrong already committed or out of a spirit of vengeance.

One of these bulls was named Old Jake, and he was the one which was maimed. In its opinion the court said:

> The proof further showed that Old Jake was wounded in such part of his anatomy, and to such an extent, as to destroy his value as a breeding animal, and that Old Jake went to the slaughter house to be consumed as beef.[11]

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[10]Wilson v. State, 198 Miss. 828, 23 So.2d 684 (1945).
[11]Cadenhead v. Goodman, 148 Miss. 88, 114 So. 124 (1927).

The Case of the Bull-Cow

Ransome Clark was indicted and convicted on an indictment which charged that he stole "one white male yearling, or bull-cow." The defendant raised the defense that there was no such animal as a "bull-cow," and that hence he could not steal something that never was. The Supreme Court of Mississippi disposed of the issue as follows:

> It is insisted that such description is incongruous to the point of impossibility. Some concession may be made on the basis of a technical inadvertence, but it may well be doubted whether the jury was confused as to the nature of the property taken. Moreover, this defect, if any, was not sought to be availed of in the only manner provided.[12]

Segregation

In two cases, one from Michigan and one from Missouri, the Supreme Court of the United States delivered an astounding ruling as to covenants running with the land. This was at its October Term, 1947. Chief Justice Vinson, in the court's opinion, said:

> These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.

And further on, in the opinion of the court, he also said, referring to *Corrigan v. Buckley*[13] that:

> This court concluded that since the inhibitions of the constitutional provisions invoked apply to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private owners, were invalid.

With this premise, that such restrictive covenants are valid, nevertheless the Supreme Court of the United States solemnly reached and announced the following to be the law: "Upon full consideration we have concluded that in these cases the states have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment."

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[12]Clark v. State, 40 So.2d 591 (Miss. 1949).
[13]271 U. S. 323 (1926).

Since the Supreme Courts of Michigan and Missouri had ordered enforcement of the covenants as valid, also declared valid by Chief Justice Vinson, this decision boils down to a holding that while such restrictive covenants are valid, they are unenforceable by the courts. In other words, they are valid until the courts are called upon to consider them. Cicero would have exclaimed, mirabile dictu! All I can say in polite society is, What the heck! Strange to relate, there was no dissent, but Justices Reed, Jackson, and Rutledge took no part in the decision. Their reasons for this are not revealed in the published report.[14]

It seems paradoxical that in one of these cases some of the parties named Coons were whites and on the losing side, against the winning actual "coons" on the other side. So, it may well be said of these cases that "All coons don't look alike," to transpose the old familiar song that "All coons look alike."

Comical Courtroom Events

As a matter of conventionalism, it is generally customary to intersperse throughout speeches, and sometimes in magazine articles, so-called jokes to keep an audience awake, or retain the interest of a reader, and supposedly to illustrate a point. I have no specific point to illustrate, but I do have a small collection of genuine courtroom comedy, and I will give them all to you here and now, illustrating as they do oddities and vagaries in courtroom conduct.

"Repeat the words the defendant used," said the lawyer. "I'd rather not. They were not fit words to tell a gentleman." "Then," said the attorney, "whisper them to the judge."

An old negro was charged with chicken stealing, and the judge said: "Where's your lawyer, uncle?" "Ain't got none, Judge." "But you ought to have one," returned the court, 'I'll assign one to defend you." "No, sah, no sah, please don't do that," begged the defendant. "Why not?" persisted the judge. "It won't cost you anything. Why don't you want a lawyer?" "Well, Ah'll tell you, Jedge," said the old man confidentially, "Ah wants to enjoy dem chickens mahself."

A lawyer was arguing a complicated case, and looked up authorities back to Julius Caesar. At the end of an hour and a half, in the most intricate part of his plea, he was pained to see what looked like inattention. It was as he had feared. The judge was unable to appreciate the nice points of his argument. "Your honor," he said, "I beg your pardon, but do you follow me?" "I have so far," answered the judge, shifting wearily

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[14]Shelley v. Kraemer, 334 U. S. 1 (1947); McGhee v. Sipes, 334 U. S. 1 (1947).

about in his chair, "but I'll frankly say that if I thought I could find my way back, I'd quit right here."

A lawyer was cross-examining a witness. He asked: "And you said you called on Mrs. Jones, May second. Now will you tell the jury just what she said?" "I object to the question," interrupted the lawyer on the other side. There was nearly an hour's argument between counsel, and finally the judge allowed the question. "And as I was saying," the first lawyer began again, "on May second you called on Mrs. Jones. Now what did she say?" "Nothing," replied the witness. "She was not at home."

Lawyer: "Now that we have won, will you tell me confidentially if you stole the money?"

Client: "Well, after hearing you talk in court yesterday, I am beginning to think I didn't."

"I couldn't serve as a juror, Judge. One look at that fellow convinces me he's guilty." "Sh-h! That's the district attorney!"

A strapping negro woman was up before a justice, charged with unmercifully beating her boy, a saddle-colored imp. "I don't understand how you can have the heart to treat your own child so cruelly." "Jedge, has you been a parent of a wufless yaller boy like dat cub of mine?" "Never—no, never!" ejaculated the judge, with great vehemence, getting red in the face. "Den don't talk; you don't know nuffin about it!"

A young lawyer was once making his first effort, and had thrown himself on the wings of imagination into the seventh heaven, and was preparing for a higher ascent when the judge struck his rule on the desk once or twice, and exclaimed to the astonished orator; "Hold on, my dear sir, don't go any higher, you are already out of the jurisdiction of this court."

Bursting open the door marked "Private," the butcher confronted the local lawyer. "If a dog steals a piece of meat from my shop, is the owner liable?" he asked the man behind the desk. "Certainly," replied the lawyer. "Very well, your dog took a piece of steak worth half a dollar about five minutes ago." "Indeed," he returned smoothly. "Then if you give me the other half, that will cover my fee."

A witness was asked to tell what he found on the premises. "Naught but barren nothingness, as Shakespeare says," testified the witness. "Never mind what Shakespeare says!" commanded the court. "If he knows anything about this case he can be summoned."

In the Matter of Former Laws as to Oaths, and Negro and Mulatto Witnesses in Court

In August of 1931 the late George Butler, the late distinguished member of the Mississippi Bar, delivered an intriguing address to the State Bar Association.[15] I have time for only one reference to it. From it we learn that by the Code of 1857 no oath was required from negroes or mulattoes in cases in which they were permitted to testify. They were not regarded as human beings but merely as chattels, in most aspects. The judge of the court, however, was required to charge such witnesses, requiring them to tell the truth, in the following language:

> You are brought here as a witness, and by the direction of the law, I am to tell you before you give your evidence that you must tell the truth, the whole truth, and nothing but the truth; and if it be found hereafter that you tell a lie, and give false testimony in this matter, you must for so doing have both your ears nailed to the pillory, and cut off, and receive thirty-nine lashes on your back, well laid on at the common whipping post.

The language of the Mississippi statute prescribed the penalty as follows:[16]

> To have one ear nailed to the pillory, there to stand for a space of one hour, and then the said ear to be cut off, and, thereafter the other ear nailed in like manner and cut off at the expiration of one hour, and, moreover, to receive thirty nine lashes on his or her back well laid on at the public whipping post, or such other punishment as the court shall think proper, not extending to life or limb.

There is no record, as far as Mr. Butler and I have been able to find, of the actual infliction of this penalty on any negro or mulatto, and it is safe to assume that it never was actually imposed. Perhaps slave owners resisted its imposition because the result would impair the marketability of the slave; or perhaps, the owner cautioned slaves to tell the truth, for fear of the penalty; or it may be that perjury was not as common then as it sometimes appears to be now.

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[15]Butler, *Some Observations Concerning Our Laws and the Administration of Justice*, 4 Miss. L. J. 26, 33 (1931).

[16]Miss. Code, c. 73, § 59 (Poindexter's, 1823).

Carpet Bag Supreme Court

In dealing with the right of eminent domain, the Supreme Court of Mississippi, at its October Term of 1895, spurned decisions of the "carpet bag court," whose opinions are set forth in Volume 42 of the Mississippi Supreme Court Reports. Justice Woods, writing of that reconstruction period court of 1868, said:

> Perhaps the case most cited for the false view is that of *Railroad Company v. Devaney,* in the book entitled 42 Mississippi Reports. The case has no binding authority upon us, nor does the doctrine of *stare decisis* have any application in the case referred to, nor in any other case found in the so-called 42 Miss. The opinions found in the volume are the utterances of a tribunal appointed by the military satrap who then ruled in a prostrate commonwealth, and have no other binding authority upon us than that each case therein must be regarded as *res adjudicata.*[17]

The personnel of the "carpet bag court" included Thomas G. Shackelford, as Chief Justice, and E. G. Peyton and E. Jeffords, as Associate Justices. This volume, 42 Mississippi Reports, contains some 189 cases and embraces 809 pages. In Volume 43 of the Mississippi Reports, Ephraim G. Peyton is shown to have been elevated to the post of Chief Justice, with Horatio F. Simrall and Jonathan Tarbell as Associate Justices. Opinions rendered by that court are precedents and binding under the rule of *stare decisis.*

Looney Statutes and Ordinances from Over the Nation

I will not attempt to reach a climax, but will close with the following "looney" statutes and ordinances collected at random from various states and municipalities:

Penal Code Section 6260, California State Vehicle Act, Chapter XVIII, paragraph 187, reads:

"It is a misdemeanor to shoot at any kind of game bird or mamal—*except a whale,* from an automobile or airplane."

Ordinance No. 16 of Columbus, Mont., provides that: "Any person who shall not lift his hat to the Mayor as he passes him on the street, will be guilty of a misdemeanor."

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[17]Lusby v. Kansas City, Memphis and Birmingham R.R., 73 Miss. 360, 19 So. 239 (1896).

And this is the law in Alabama: "The teeth of a horse offered for sale to the public shall not be stained, discolored or otherwise camouflaged so as to be misleading indication of the animal's age and health."

Wichita, Kansas Ordinance No. 381 reads:

> That it shall be unlawful for any person to throw upon or against another person in the city of Wichita, any confetti or similar preparation or to throw same about in any street or public building or place in said city. It is further made unlawful for any person to throw as aforesaid any flour, talcum powder, rice or other substance or preparations for the purpose of annoying or harassing others.

And here is Section 1 of the Tennessee Act which incorporates the town of Ripley, in Lauderdale County, Tennessee:

> Be it enacted by the General Assembly of the State of Tennessee, that . . . the boundaries of said town of Ripley shall be as follows: Beginning at a stake in the West boundary line of the present limits of the old corporation . . . thence north eighty-five degrees and East to a *black gum marked with a cross and with mistletoe* in the top, and *with a blue bird sitting on a limb* which tree is a short distance East of Ed Johnson's horse lot; . . .

Ohio General Code, Title II, Chapter 20, page 1590, Section 6281, provides:

"Any person assaulted and lynched by a mob may recover, from the county in which such assault is made, a sum not to exceed five hundred dollars."

A city ordinance of Alderson, West Virginia, states:

"No lions shall be allowed to run wild on the streets of this city."

And this is or was good law in Kansas:

"When two trains approach each other at a crossing, they shall both come to a full stop, and neither shall start up until the other has gone."

The following ordinance was passed by the city government of Waterloo, Nebraska in 1910:

"It shall be illegal for any barber in this town to eat onions between 7 A.M. and 7 P.M."

Act 239 of Michigan Laws of 1907 reads:

"An Act to provide for the lawful taking of suckers, mullet, dogfish, and lawyers from the waters of Sturgeon River."

The Place of Humor

In the early days of the present century there was published in the City of New York a famous, humorous weekly called "Puck," devoted to friendly humor and affectionate satire of the human race, which carried on its title page the famed slogan, "What fools these mortals be." In all good humor and affection for the mortals who authored these "looney" statutes and ordinances, and whose foibles and eccentricities have added to the joy of living, refer to the old saw that "A little nonsense now and then is relished by the wisest men." While these cases, statutes and ordinances are generally absurd, their unconscious and undesigned humor lend gaiety to otherwise unexciting events in the law.

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1949-1950

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NOTES

THE ADMISSIBILITY OF A CONFESSION IN MISSISSIPPI

The Mississippi court distinguishes a confession from an admission. While a voluntary statement of guilty agency or participation in the crime is a confession; when a person charged with crime admits only certain facts from which guilt may be inferred, this will not amount to a confession.[1] Furthermore, guilty conduct on the part of an accused person is not within the confession-rule.[2] It is the purpose of this paper to examine the basic principles upon which confessions are admitted or excluded, to consider certain aspects of trial court procedure to determine admissibility, and to discuss certain factual elements bearing on the admissibility of confessions. No attempt has been made to classify and examine the various factual situations which may or may not cause a confession to be excluded. Nor has any attempt been made to trace the development in the United States Supreme Court of the doctrine introduced by *Brown v. Mississippi*.[3]

I. Basic Principles

Whether the admission of confessions as evidence against the accused is an exception to the hearsay rule,[4] or are not within that rule,[5] the principle of their admissibility is that one will ordinarily not make statements against his interest unless they are true.[6] On the other hand, the most authoritative view as to the fundamental principle upon which confessions are excluded is that under certain conditions they may be testimonially untrustworthy.[7] This is the view championed by Wigmore.[8] That is the principle upon which the early Mississippi cases excluded confessions,[9] and the principle has been applied in a very recent case.[10]

But in Mississippi another ground has been advanced for excluding confessions. By Article 3, Section 26 of the Mississippi Constitution of 1890 it is provided that: "In all criminal prosecutions the accused shall have a right . . .; and he shall not be compelled to give evidence against himself; . . . ." As early as 1856 it was held that the constitutional guaranty against self-incrimination is violated by a confession of guilt

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[1]Pringle v. State, 108 Miss. 802, 67 So. 455 (1915).
[2]Belote v. State, 36 Miss. 96 (1858); 3 Wigmore, Evidence 821 (3rd ed. 1940).
[3]297 U.S. 278 (1936).
[4]20 Am. Jur. § 481.
[5]3 Wigmore, Evidence § 816 (3rd ed. 1940).
[6]Brown v. State, 32 Miss. 433 (1856); *supra* note 4.
[7]20 Am. Jur. § 483; 22 C. J. S. § 817.
[8]3 Wigmore, Evidence § 822 (3rd ed. 1940).
[9]Belote v. State, *supra* note 2, (by implication); Garrard v. State, 50 Miss 147 (1874); Cady v. State, 44 Miss. 343 (1870).
[10]Usrey v. State, 198 Miss. 17, 20 So. 2d. 847 (1945).

extorted from a defendant by duress.[11] This holding has been approved in later cases.[12] Such a view is not without its supporters.[13] Professor McCormick urges that while the policy of safeguarding the trustworthiness of evidence admitted has had an ancillary role in shaping the rules restricting the admission of confession, the predominant motive of the courts has been that of protecting the citizen against the violation of his privileges of immunity from being bodily manhandled by the police, and from other pressures of the third degree.[14] He suggests that the statement of the confession-rule in terms of "voluntariness" is prompted by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against self-incrimination.

If the true principle upon which confessions are excluded is that under certain circumstances they may be testimonially untrustworthy, it would follow that where it is shown that the confession, or a part of it, is true, the confession or a part of it should be admissible. On the other hand, if the privilege against self-incrimination is the true principle or an alternative one, the fact that the confession or a part of it is shown to be true would not make it admissible. This follows because the privilege against self-incrimination is designed to exclude evidence violating the provision whether the evidence be true or false.[15] In Mississippi it is settled law that inculpating facts discovered by means of an involuntary confession may be established against a defendant.[16] Therefore, it would seem to follow that the principle upon which Mississippi excludes a confession is that under certain circumstances it may be testimonially unreliable.

The Mississippi rule, that the extra-judicial confession of a prisoner in a felony case must be supported by some independent proof of the corpus delicti, is also a safe-guard against an untrue confession.[17] Furthermore, the fact that a confession is made during an illegal search does not make

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[11]Jordan v. State, 32 Miss. 382 (1856).

[12]Fisher v. State, 145 Miss. 116, 110 So. 361 (1926); Whip v. State, 143 Miss. 757, 109 So. 697 (1926); *see* State v. Billups, 179 Miss. 352, 174 So. 50 (1937); Williams v. State, 129 Miss. 469, 92 So. 584 (1922); Tucker v. State, 128 Miss. 211, 90 So. 845 (1922); Brown v. State, 173 Miss. 542, 158 So. 339 (1935). *But see* Goss v. State, 144 Miss. 420, 110 So. 208 (1926).

[13]McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447-453 (1938); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239 (1946); See Note, 50 L. R. A. (N.S.) 1077 (1914).

[14]16 TEX. L. REV. 453 (1938).

[15]3 WIGMORE, EVIDENCE § 823 (3rd ed. 1940).

[16]Belote v. State, *supra* note 2; Van Buren v. State, 24 Miss. 512 (1852); Warren v. State, 174 Miss. 63, 164 So. 234 (1935); Patton v. State, 201 Miss. 410, 29 So. 2d 96 (1947); Whitely v. State, 78 Miss. 255, 28 So. 852 (1900), (By implication); *see* Garrard v. State, *supra* note 9; Pringle v. State, *supra* note 1. *Contra:* Jordan v. State, *supra* note 11.

[17]Williams v. State, 129 Miss. 469, 92 So. 584 (1922); Floyd v. State, 138 Miss. 697, 103 So. 368 (1925).

it inadmissible if it was voluntary;[18] nor does the fact that the confession was made while in custody under an illegal arrest.[19] Though the Mississippi court seems to hold that the word "evidence" in the provision against self-incrimination means evidence by a defendant out of court as well as in court,[20] it may be significant that in the cases where it has been squarely held that the self-incrimination provision applies, the same result was reached without the aid of that rule. One might conclude, therefore, that it has been used as but an additional reason to buttress a conclusion already reached on other grounds.

II. Procedure to Determine Admissibility

The leading Mississippi case dealing with the procedure to determine the admissibility of a confession is *Ellis v. State*.[21] There the court said:

> Before a confession can be received in evidence against a defendant in a criminal trial, it must be shown that it was voluntary; . . . . Whether it was so made or not is a preliminary matter for the court, and not for the jury to determine. . . . When it is proposed to introduce in evidence a confession of the accused against himself, the court should, upon a preliminary investigation, conducted out of the presence and hearing of the jury, if requested by the defendant, determine whether it is competent or not. If satisfied, after hearing all the testimony pertinent to the inquiry, that the confession is admissible, it should go to the jury; but unless it plainly appears that it was free and voluntary, if there is a reasonable doubt against its being free and voluntary, it should be excluded from the jury.

If there is an objection to the introduction of the confession in evidence, the proof that it was free and voluntary should precede the admission of the confession.[22] The burden is on the state to prove that the confession was freely and voluntarily made.[23] Though the question of admissibility is a preliminary question of fact for the trial judge to decide,[24] proof that the confession was freely and voluntarily made must be beyond a reasonable doubt.[25] But where the evidence as to admissibility is conflicting, his decision will not be set aside unless it is clearly contrary to

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[18]Quan v. State, 185 Miss. 513, 188 So. 568 (1939).
[19]Ruffin v. State, 39 So 2d 269 (Miss. 1949).
[20]State v. Billups, *supra* note 12.
[21]65 Miss. 44, 3 So. 188 (1887).
[22]Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925).
[23]Brittenum v. State, 175 Miss. 453, 167 So. 619 (1936).
[24]Ellis v. State, *supra* note 21.
[25]Ellis v. State, *supra* note 21; Whip v. State, 757, 109 So. 697 (1926); Bartee v. State, 180 Miss. 141, 177 So. 355 (1937).

the weight of the evidence.[26] It is error to instruct the jury to disregard a confession if they think it is not freely and voluntarily made because the question of admissibility is exclusively for the court.[27] On the other hand, the credibility of the confession is for the jury.[28]

The defendant must ask for a preliminary hearing or offer to prove that the alleged confession was not voluntarily made; and a general objection to the introduction of a confession in evidence where it purports to be voluntary will not preserve the point for appeal.[29] Failure of the trial court to conduct a preliminary inquiry as to the admissibility of a confession is not error unless it is requested to do so.[30] If a preliminary hearing is requested and is refused, it will depend upon the circumstances of the case as to whether there was error.[31]

Upon the preliminary inquiry the court must decide: first, was there a confession; and second, was it free and voluntary.[32] It is error to refuse to allow the defendant to show that in fact no confession was made.[33] The fact that the defendant denies on preliminary inquiry that he made a confession does not preclude him from urging as a defense that the confession was not freely and voluntarily made.[34] The defendant has the right to give any evidence on the preliminary hearing that has a bearing on the admissibility of the confession;[35] and he may testify himself.[36] It is held that a refusal by the trial court to allow the defendant to testify upon a preliminary hearing denies him his constitutional right to be heard under Section 26 of the Mississippi Constitution because the defendant

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[26]Stubbs v. State, 148 Miss. 764, 114 So. 827 (1927); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928); Loftin v. State, 150 Miss. 218, 116 So. 435 (1928); Tyler v. State, 159 Miss. 223, 131 So. 417 (1930); Smith v. State, 165 Miss. 462, 144 So. 233 (1932); Whittaker v. State, 169 Miss. 517, 142 So. 474 (1932); Buckler v. State, 171 Miss. 353, 157 So. 353 (1934); Holloway v. State, 187 Miss. 238, 192 So. 450 (1939); Gross v. State, 191 Miss. 383, 2 So. 2d 818 (1941); Parker v. State, 194 Miss. 895, 13 So. 2d 620 (1943), *cert. denied*, 320 U.S. 705 (1943); Street v. State, 200 Miss. 226, 26 So. 2d 678 (1946); Lee v. State, 201 Miss. 48, 28 So. 2d 122 (1946).

[27]Ellis v. State, *supra* note 21; Stepney v. City of Columbia, 157 Miss. 193, 127 So. 687 (1930); Hunter v. State, 21 So. 385 (1897). *But see* Johnson v. State, 89 Miss. 773, 42 So. 606 (1907); Scarbrough v. State, 37 So. 2d 748 (1948); Lee v. State, 39 So. 2d 868 (1949).

[28]Ellis v. State, *supra* note 21.

[29]Johnson v. State, 196 Miss. 402, 17 So.2d 446 (1944); Blackshire v. State, 158 Miss. 364, 130 So. 498 (1930).

[30]Dobbs v. State, 167 Miss. 609, 142 So. 500 (1932).

[31]English v. State, 39 So.2d 876 (1949); For cases where it has been held to be error see Simmons v. State, 61 Miss. 243 (1883); Draughn v. State, 76 Miss. 574, 25 So. 153 (1899); Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925); Fletcher v. State, 159 Miss. 46, 131 So. 251 (1930).

[32]Morroco v. State, 37 So.2d 751 (1948).

[33]Morroco v. State, *supra* note 32.

[34]Allen v. State, 180 Miss. 418, 177 So. 787 (1938); Humphries v. State, 181 Miss. 325, 179 So. 561 (1938).

[35]Warren v. State, 174 Miss. 63, 164 So. 234 (1935); Elliott v. State, 185 Miss. 381, 189 So. 796 (1939); English v. State, 39 So.2d 876 (1949).

[36]Warren v. State, *supra* note 35; Elliott v. State, *supra* note 35; English v. State, *supra* note 35.

would have no opportunity to question the admissibility of a confession without taking the stand as a witness before the jury in regard thereto, although he might otherwise choose not to do so.[37] When the accused testifies on the preliminary hearing as to the admissibility of an alleged confession he does not thereby subject himself to cross-examination on the question of his guilt *vel non* of the crime charged.[38] Even if the defendant failed to object to the cross-examination into his guilt on preliminary inquiry, this is not a waiver of the right to object when such evidence is offered to the jury by the state as a part of its evidence in chief.[39]

In several cases the defendant has failed to put on his evidence to show that the confession was involuntary on the preliminary hearing, but has waited until the state has rested its case before the jury. Where such is the case, the defendant is allowed to introduce evidence that the confession was involuntary as part of his defense before the jury; and the fact that he denied making the confession at all on a preliminary hearing does not preclude him from doing so.[40] After the defendant has introduced his evidence to show the confession was not voluntary, if he wishes to claim that the confession should have been excluded, he must move to exclude it.[41] The mere fact that he produces evidence tending to show that his confession was coerced does not make it inadmissible, but it is a question for the trial judge.[42]

It has been held that a request for a peremptory instruction will not raise the question of admissibility of a confession admitted without conflicting testimony on preliminary hearing, though evidence to the contrary was introduced by the defendant to the jury, there being no motion to exclude.[43] Nor was it error for a trial judge to refuse to allow a defendant to cross-examine the state's witnesses before the jury as to the details attending the making of a confession on the general statement by counsel that he wanted to offer some evidence that was heard out of the presence of the jury, but without stating the purpose for which the evidence was offered or that it was for the purpose of affecting the credibility of the confession.[44] But for the purpose of offering evidence going to the credibility of the confession, a cross-examination is proper. Where the defendant has to testify to show the involuntary nature of a confession, it is error

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[37]See the cases cited in note 35.
[38]Hawkins v. State, 193 Miss. 586, 10 So.2d 678 (1942).
[39]Hawkins v. State, *supra* note 39.
[40]Allen v. State, *supra* note 34; Humphries v. State, *supra* note 34.
[41]Loftin v. State, 150 Miss. 228, 116 So. 435 (1928); Perkins v. State, 160 Miss. 720, 135 So. 357 (1931); Brown v. State, 173 Miss. 542, 158 So. 339 (1935), *suggestion of error overruled*, 173 Miss. 542, 161 So. 465 (1935); Wohner v. State, 165 Miss. 428, 167 So. 622 (1936); McDowell v. State, 189 Miss. 617, 198 So. 564 (1940).
[42]Wohner v. State, *supra* note 41.
[43]Wohner v. State, *supra* note 41.
[44]Nichols v. State, 165 Miss. 114, 145 So. 903 (1933).

for the state on cross-examination before the jury to ask him about alleged statements made during the coercive proceeding and contradict his evidence in reference thereto by showing such statements.[45] The evidence being coerced, it cannot be used at all.

III. Admissibility in General

If the true principle upon which confessions are excluded is that under certain conditions they may be testimonially untrustworthy, it would seem to follow that the test of their admissibility should be: Was the confession made under such circumstances that the accused would be likely to confess whether he was guilty or innocent. However, the Mississippi court has usually said that the confession must have been freely and voluntarily made.[46] This seems to be a mere short-hand expression of the test which follows from the principle of exclusion. Yet, it was once held that a voluntary confession was one proceeding from a spontaneous operation of the party's mind, free from the influence of any extraneous cause.[47] In a later case, however, it was held that it was not required that a confession should have been spontaneously made in order to be voluntary.[48] Sometimes the court has said that the confession must not have been induced by a threat, or a promise, or by fear or hope, or by violence. These different statements of the test of admissibility seem to point at some specific aspect of the circumstances surrounding the making of a confession, which, though they tend to indicate the answer to the fundamental question, are not conclusive in themselves. Assuming that the principle of exclusion is testimonial unreliability, it is submitted that the test is correctly expressed in the foregoing.

Necessity of a Caution

It has often been urged that a confession is not admissible because the officer to whom it was made did not warn the defendant that what he might say could be used against him. Perhaps the leading case on the point is *Hitt v. State,*[49] decided in 1938. There the county attorney, before questioning the accused, told him that, "You don't have to tell me anything at all unless you care to," but he was not warned that anything he said might be used against him. On preliminary hearing, as the evidence indicated without conflict that the confession was voluntary, the trial judge overruled the general objection to the testimony as well as the specific

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[45]Fisher v. State, 145 Miss. 116, 110 So. 361 (1926).
[46]Hunter v. State, 74 Miss. 515, 21 So. 305 (1897); Blalack v. State, 79 Miss. 517, 31 So. 105 (1902).
[47]Whip v. State, *supra* note 25; Johnson v. State, 107 Miss. 196, 65 So. 218 (1914).
[48]Keeton v. State, 175 Miss. 631, 167 So. 68 (1936).
[49]182 Miss. 184, 181 So. 331 (1938).

objection that the prosecuting attorney as a judicial officer had not warned the accused. On appeal the court classified all confessions as judicial or extrajudicial, holding the former to be one made before a court or tribunal having some authority to dispose of the pending case, all other confessions being extrajudicial. It held the confession in issue to be extrajudicial. Two questions were presented by the appeal: (1) Does the rule that a confession is incompetent when made to a judicial officer without a warning that the confession will be used against the defendant apply to such officers generally, or only when they are in the discharge of judicial duties? (2) Was the county prosecuting attorney a judicial officer within the meaning of the rule? The first question was not decided because the latter was answered in the negative. However, although the court declared that it was not deciding the first question, it discussed some of the Mississippi cases for the purpose of showing that the circumstances under which the confessions were made, if these showed that the confessions were not free and voluntary, always control this court as to whether reversal should be had in a given case or not. Speaking of *Dick v. State*,[50] where Dick made a confession after the coroner had arrived at the place where the prisoner was held, the court quoted this statement from that case: "The confessions of the prisoners, Dick and Aleck, were not made *before an officer during the course of a judicial examination.*" (Italics added by the court). Although the *Dick* case did hold that as to Dick and Aleck there was no necessity that they should have been warned of their rights, still as to Henry, it held that his confession was incompetent, evidently because it was made while in the custody of one appointed by the coroner, though the coroner and his jury were then in the next room.

If, therefore, the court in the *Hitt* case meant to indicate that for a warning to be necessary the confession must have been made during the course of a judicial investigation, then the decision that it cites to support such a view seems to be authority for the proposition that if the confession is made to an appointee of an officer conducting a judicial investigation, though not in the course of a judicial examination, a warning is necessary. There seems to be an implicit assumption in the *Dick* case that not only is a coroner a judicial officer, but that his appointee is also. The confession of Henry is extrajudicial in the sense that it was "not made before a court or tribunal having some authority to dispose of the pending case." Hence, the court in the *Dick* case thought that it was not necessary that the confession be made during the course of a judicial examination to necessitate a warning being given, but that it was sufficient to make the warning necessary that it be made to an appointee of a judicial officer.

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[50]30 Miss. 593 (1856).

The *Dick* opinion relied upon *Peter v. State*,[51] and *Van Buren v. State*[52] for authority for its ruling that the confession of Henry was not admissible. In the former, a group of armed men had arrested the defendant and threatened to hang him if he did not confess, whereupon he confessed. Shortly thereafter he was taken before a justice of the peace where he was interrogated as to his guilt without being warned that what he might say could be used against him. The group of armed men who had extorted the first confession were present at the hearing before the justice of the peace. The trial court ruled out the first confession but allowed the confession before the justice of the peace to come in. But on appeal the second confession was held not to be admissible because the presumption was that the same influence which induced the first confession induced the second. No circumstances appeared which indicated that the baleful influence that induced the first had ceased to act, and no caution had been given. The court indicated that there must be very clear and strong evidence of explicit warning by the magistrate of the consequences of a confession, after the fact is known of the existence of either the influence of hope or fear superinducing such confession. The *Peter* case, then, is distinguishable on the ground that a warning was necessary there to dispel the presumption of continued unlawful inducement. But such a distinction would ignore the fact that the second confession was made to a justice of the peace, surely a judicial officer, during the course of a judicial examination. The *Van Buren* decision goes no further than to hold that where it is shown that a confession was not voluntarily made, for a second confession to be admissible a warning must be given. The second confession there was not made to a judicial officer and it was not made during the course of a judicial examination.[53]

Thus it seems that except for the *Dick* case there is no authority in Mississippi for the proposition that a warning is necessary for a confession made to a judicial officer to be admissible. *Stepney v. City of Columbia*[54] points out that the statements in *Ammons v. State*[55] and *Whip v. State*[56] apply only to a judicial officer. But even the *Stepney* opinion is not authority that a confession made to a judicial officer must be preceded by a warning because there the confession was made to a police officer, surely not a judicial officer. Actually, in the *Dick* case the person to whom the confession was made by Henry was an appointee of a judicial officer, the coroner, and the confession was made while the coroner and the jury were

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[51] 4 Smedes & M. 31 (Miss. 1844).
[52] 24 Miss. 512 (1852).
[53] Ford v. State, 75 Miss. 101, 21 So. 524 (1897), is distinguishable on the same ground.
[54] 157 Miss. 193, 127 So. 687 (1930).
[55] 80 Miss. 592, 32 So. 9 (1902).
[56] *Supra* note 25.

in the next room. Nevertheless, the clear indication of the *Hitt* opinion is that the Mississippi court intends to restrict the rule requiring that a warning be given to a situation where the confession is made to a judicial officer during the course of a judicial investigation.

One might prophesy, therefore, that the Mississippi court will hold that even though a confession is made to a judicial officer, a warning is not necessary unless it was made during the course of a judicial examination. There can scarcely be any doubt in this state that in the case of an extrajudicial confession not made to a judicial officer a warning is not necessary.[57] It is so held even where the accused is in custody.[58] This seems to be in line with the general rule that in the absence of a statute so requiring, an extrajudicial confession is not inadmissible because the accused was not cautioned that it might be used against him.[59]

Furthermore, the language of the *Hitt* case seems to cast a doubt upon whether if the confession was otherwise admissible, the case would be reversed because the officer to whom the confession was made did not warn the accused. The lack of a warning would seem to be but one of the circumstances tending to show whether a confession met the test of admissibility.

Presumption That Illegal Inducement Continues

In a number of Mississippi cases the question has arisen whether, after a confession has been made under circumstances indicating that it was involuntary, a subsequent confession by the accused to that or a different person is admissible. In such a case the presumption is that the influence that induced the first confession also induced any subsequent confession.[60] However, the presumption is a rebuttable one and may be overcome by proof that the subsequent confession was made under circumstances rendering it voluntary.[61] The length of time intervening between

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[57]Stepney v. City of Columbia, *supra* note 54; Simon v State, 36 Miss. 636 (1859); Carothers v. State, 121 Miss. 762, 83 So. 809 (1920); Donahue v. State, 142 Miss. 20, 107 So. 15 (1926); Brown v. State, 142 Miss. 335, 107 So. 373 (1926); Nichols v. State, 165 Miss. 114, 145 So. 903 (1933); Watson v. State, 166 Miss. 194, 146 So. 122 (1933); Wohner v. State, 175 Miss. 428, 167 So. 622 (1936); Criss v. State, 202 Miss. 184, 30 So.2d 613 (1947); Dampier v. State, 31 So.2d 115 (1947).

[58]Watson v. State, *supra* note 57.

[59]c.j.s. § 822.

[60]Peter v. State, *supra* note 51; Van Buren v. State, *supra* note 52; Simon v. State, 36 Miss. 636 (1859); Ford v. State, *supra* note 53; Whitely v. State, 78 Miss. 255, 28 So. 852 (1900); McMaster v. State, 82 Miss. 459, 34 So. 156 (1903); Banks v. State, 93 Miss. 700, 47 So. 437 (1908); Durham v. State, 94 Miss. 608, 47 So. 545 (1908); Reason v. State, 94 Miss. 290, 48 So. 820 (1909); White v. State, 129 Miss. 182, 91 So. 903 (1926); Jones v. State, 138 Miss. 684, 98 So. 150 (1923); Whip v. State, *supra* note 25; Randolph v. State, 152 Miss. 48, 118 So. 354 (1928); Bourdeaux v. State, 175 Miss. 625, 168 So. 621 (1936); Barnes v. State, 199 Miss. 86, 23 So.2d 405 (1945).

[61]See the cases cited *supra* note 60.

the improper inducement and the subsequent confession,[62] the giving or lack of a warning before the subsequent confession,[63] and the presence of the same parties at the time of the subsequent confession as were present at the prior confession[64] are important factors to consider. The question is essentially one of fact and no general rule can be laid down.[65] Of course, the fact that a subsequent confession was involuntary will not render inadmissible a prior voluntary confession.[66]

Although it once was thought that to dispel the presumption of illegal inducement the accused must have been warned before the subsequent confession and must have understood such warning,[67] later cases have restricted this ruling to a case where the subsequent confession is made before a judicial officer in the course of a judicial investigation.[68] Whether the warning is necessary in such a case to dispel the presumption or because the confession was made before a judicial officer in the course of a judicial investigation is a question not free from doubt.[69] It is clear that if the subsequent confession is not made to a judicial officer a warning is not absolutely necessary.[70] The fact that a warning is given is not conclusive.[71]

Proof of Corpus Delicti

Perhaps no other point relating to the admissibility of a confession in Mississippi has been as frequently litigated and as troublesome as has the question whether the extrajudicial confession of a prisoner charged with a capital felony is sufficient without proof, independent of the confession, of the corpus delicti, to authorize a verdict of guilty. It is settled today that it is not.[72]

If it is a rule that there must be some evidence aliunde the confession of the corpus delicti in a felony case, it is important to consider first, what is the corpus delicti of a given crime for this purpose; secondly, what degree of proof aliunde the confession is necessary; and thirdly, what is the reason behind the rule.

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[62]Reason v. State, *supra* note 60; Jones v. State, *supra* note 60.
[63]Peter v. State, *supra* note 51; Van Buren v. State, *supra* note 52; Jones v. State, *supra* note 60.
[64]Banks v. State, *supra* note 60; White v. State, *supra* note 60; Barnes v. State, *supra* note 60.
[65]Banks v. State, *supra* note 60.
[66]Usrey v. State, 198 Miss. 17, 20 So.2d 847 (1945).
[67]Peter v. State, *supra* note 51; Van Buren v. State, *supra* note 52.
[68]Simon v. State, *supra* note 60.
[69]See the discussion in the text of the necessity of a caution.
[70]Simon v. State, *supra* note 60.
[71]Jones v. State, *supra* note 60; Barnes v. State, *supra* note 60.
[72]Stringfellow v. State, 26 Miss. 157 (1853); Jenkins v. State, 41 Miss. 582 (1867).

It is said in *Williams v. State*[73] that the rule is an outgrowth of the fact that a considerable number of persons, if permitted, for one cause or another will confess guilt of imaginary and not real crimes. Implicit in such a statement is the notion that as evidence a confession is not of the highest probative tendency. The real object of the rule, then, would seem to be to safeguard what is considered as somewhat unreliable evidence.[74] If such is its proper function, in considering what are the elements of the corpus delicti of a given crime it would seem to follow that three elements must be established: (1) the harm or injury embraced in the particular crime, such as the death in a murder case or the loss of property in a larceny charge; (2) the criminal origin of the harm or injury; and (3) the criminal participation of the accused himself.[75] But Mississippi seems to require proof of only the first two elements,[76] though an early case seems to indicate otherwise.[77] It would seem, however, that it is just as likely that some people may falsely confess to a crime that has been committed, though by someone other than the confessor, as it is that they may confess to a crime that has not been committed, but is imaginary.

Once it has been determined what the elements of the corpus delicti of the particular crime are, the next question is the sufficiency of the evidence to prove the corpus delicti aliunde the confession. The leading Mississippi authority on this point is *Heard v. State*.[78] There the defendant was charged with grand larceny in stealing the money of one Nash. Nash was not produced as a witness at the trial, but it was shown that Nash was seeking a lost pocket-book, that suspicion pointing to the accused, he was arrested, and just as the arrest took place he was observed to throw away a pocket-book, which was immediately identified in his presence by Nash as his lost property. Nash's assertion to that effect was not denied by the accused. Some papers which had been in the pocket-book were found in the place where the accused said that he had thrown them. The court held that these facts were sufficient proof of the corpus delicti aliunde a confession made before a magistrate after he had been warned to say nothing. Said the court:

> Where there has been a confession by the accused, much slighter proof is required to establish the corpus delicti than would be necessary where the state must make out the entire case,

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[73]129 Miss. 469, 92 So. 584 (1922).

[74]McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Tex. L. Rev. 245 (1946); Brown v. State, 32 Miss. 433 (1856).

[75]McCormick, *supra* note 74.

[76]Spears v. State, 92 Miss. 613 (1908); Heard v. State, 59 Miss. 545 (1882); Crabb v. State, 152 Miss. 602, 120 So. 569 (1929).

[77]Pitts v. State, 43 Miss. 472 (1870).

[78]59 Miss. 545 (1822). *But cf.* Floyd v. State, 138 Miss. 697, 103 So. 368 (1925).

> unaided by a confession. Any corroborative proof in such a case will be held sufficient which satisfies the mind that it is a real and not an imaginary crime which the accused has confessed, and the fact that he was the guilty party may be found by the jury on proof much slighter than that ordinarily essential.[79]

Thus in order to show the corpus delicti aliunde a confession it is sufficient to give evidence amounting to a probability that the crime was committed. Facts ascertained by reason of the confession of the accused may be taken into consideration in establishing the corpus delicti.[80] Once the burden is met, a confession may be admitted in evidence and if the proof aliunde plus the confession proves a corpus delicti beyond a reasonable doubt, that is sufficient.[81] Thus it is error to give an instruction in a murder case to the effect that the state must prove the corpus delicti independently of a confession.[82] On appeal in determining whether or not the evidence aliunde is sufficient to prove the corpus delicti the court is not confined to the evidence introduced by the state, but it may look to the defendant's evidence as well.[83] Though the rule is usually stated in terms of a felony, *Henley v. State*[84] seems to hold that the rule is applicable to a charge of driving a motor vehicle upon the public highway while intoxicated, a misdemeanor.[85]

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[79]Note that though the confession was made to a committing magistrate, it seems to have been dealt with as if it were strictly an extrajudicial confession. See *Pope v. State,* 158 Miss. 794, 131 So. 264 (1930), for another statement of the rule.

[80]Gipson v. State, 139 Miss. 868, 162 So. 480 (1932).

[81]Pope v. State, *supra* note 79.

[82]Brooks v. State, 178 Miss. 575, 173 So. 409 (1937).

[83]Patterson v. State, 127 Miss. 256, 90 So. 2 (1921).

[84]192 Miss. 58, 4 So.2d 543 (1941).

[85]Miss. Code § 8175 (1942); Cutshall v. State, 191 Miss. 764, 4 So.2d 289 (1941).

ADVERSE POSSESSION OF A COTENANT AGAINST A COTENANT IN MISSISSIPPI

I. Introduction

Every cotenant has the right to enter into and occupy the common property. However, this entry is subject to the limitation that the fellow tenants are not excluded or denied some right to which they are entitled as cotenants. These fellow cotenants may safely assume, until something occurs of which they must take notice, that the possession held by their cotenant is, in law, the possesion of all the cotenants, and not adverse to any of them. This proposition is based upon the theory that the entry is made either *eo nomine* as tenant in common, or that it is silently made, without any particular expression as to the intention of the cotenant that the possession be adverse.[1]

This presumption, that the possession of one cotenant is for the benefit of the other cotenants, will ordinarily preclude the acquisition of adverse title against the fellow cotenants. The statute will not run unless actual notice of the adverse character of the possession, or assertion of an exclusive claim, is so open and notorious that the other parties exercising reasonable diligence would necessarily learn of the adverse claim.[2]

From these general considerations it can be seen that the presumption is strongly against every claim by a cotenant by which he seeks to convert the circumstances of an apparently individual possession into an advantage over his fellow cotenants. The basic distinction between the elements of adverse possession in their ordinary form and adverse possession by a cotenant against a cotenant is that, in the latter case, acts of ownership by one cotenant do not of themselves necessarily amount to disseisin of the other cotenants. In order that one of several cotenants may acquire title by adverse possession as against the other, an actual ouster and an exclusion of the other tenants from possession must be shown.

The facts which will amount to an ouster of a sufficient nature to accomplish the desired end are not always easy to determine. It is certain that an intention to oust the other tenants must be manifest, and notice to the disseised cotenants of the repudiation of their rights must have been given as a basis of an adverse possession asserted against them.

II. Decisions of the Mississippi Court

The facts which will create adverse possession by one cotenant against another cotenant in Mississippi will now be considered and analyzed. In

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[1] Am. Jur. § 50.
[2] Tiffany, Real Property 1185 (3rd ed. 1939).

one instance at least the general rule in Mississippi has been extended to an alarming degree, if not circumvented altogether.

A. The *Peeples* Case

When the case of *Peeples v. Boykin*[3] was decided by the Mississippi Supreme Court in 1923, the court reiterated the rule that in Mississippi one tenant in common cannot acquire title by adverse possession against his cotenant until they have actual notice of the adverse claim or knowledge of such facts as are tantamount thereto.[4] In spite of this declaration by the court, the substance of the decision was to the effect that a tenant in common was allowed to acquire title against his cotenants by placing a deed on the deed records of the county wherein the land was situated showing title on its face to himself in fee.

The facts of the *Peeples* case tersely stated are as follows: In 1899, Mrs. N. G. Rosser died intestate in Bolivar County, Mississippi, seized and possessed of the land in question. Mrs. Rosser had two children by her first marriage and three by her second marriage. All the children were notified at the time of Mrs. Rosser's death. In 1904, the appellee, a child of the second marriage, received a conveyance from her brother and sister of an undivided two-thirds interest in the property in controversy which recited on its face that these three children were the sole and only heirs at law of Mrs. N. G. Rosser, deceased. The appellee exercised exclusive control over the property from 1904 to 1920. In 1920, the appellant, one of the children of Mrs. Rosser by her first marriage, learned of the situation and instituted a bill for partition.

In upholding the decision of the chancellor, that the appellee was the sole owner of the property under and by virtue of her possession and claim of ownership, the supreme court could have found that the appellant was under a duty, after notice of the death of his mother, to make some investigation or inquiry as to what property she had.[5] This reasoning might have brought the *Peeples* case under the general rule as to adverse possession by cotenants against cotenants insofar as the requirement exists as to facts tantamount to knowledge of the adverse possession. However, the court chose to disregard this reasoning and predicate the decision on the fact of the recording of the deed from the other cotenants, which the court held to constitute notice not only to the appellant, but to the rest of the world.

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[3]132 Miss. 359, 96 So. 177 (1923).
[4]Peeples v. Boykin, *supra* note 3 at 178.
[5]Peeples v. Boykin, *supra* note 3 at 179.

B. Other Decisions of the Mississippi Supreme Court.

Perhaps the most important case, with the exception of the *Peeples* case, involving the problem in question is that of *Gardiner v. Hinton.*[6] This case was the principal one relied on by the counsel for the appellee in the *Peeples* case. It was easily and clearly distinguished by the counsel for the appellant and by the court.

The *Gardiner* case held that when the defendants had purchased from a cotenant under a chain of deeds absolute on their face conveying the entire fee, and were not tenants in common with the complainant, title had passed by the running of the statutory period. It is an apt illustration of the rule as to a conveyance by one of the cotenants of the entire property to a stranger.

If a cotenant makes a conveyance which purports to convey not merely his undivided interest in the land, but the entire interest therein, and the grantee in the conveyance takes possession accordingly, without any recognition of the rights of the other cotenants, out of possession, the possession of the grantee is regarded as adverse and the cotenants are charged with notice. This rule is based upon the change of possession, and not upon the effect of a recording statute. With reference to recording acts, an owner is not charged with notice of anything other than interests recorded prior to the time he acquired his interest.[7]

From the statements in the above paragraph, it can be seen that the *Gardiner* case should not be cited to uphold the decision in the *Peeples* case. It is also interesting to note that the rule as to effect of the recording statute tends to cast some doubt as to the logic of the basic principle of the *Peeples* case, that is, the holding that a recorded deed by a tenant in common is notice to his cotenants of an adverse claim.

The *Gardiner* case is the only one of consequence which had been decided prior to the *Peeples* case and in any way supported it. Two cases decided after the *Peeples* decision, and citing it, seem to be based on different fact situations. *Farnsworth v. O'Neal*[8] is predicated on possession taken by a cotenant under a writ in a former suit. Entry under this claim of right, which was known to O'Neal although not binding on him, followed by Farnsworth's continued, open, and exclusive possession for more than ten years vested title in him. *Davis v. Gulf Refining Company*[9] seems to be on "all fours" with the *Gardiner* case.

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[6]86 Miss. 604, 38 So. 779 (1905).
[7]TIFFANY, *Op. Cit. supra* note 2, at 534.
[8]158 Miss. 218, 130 So. 101 (1930).
[9]202 Miss. 808, 32 So.2d 133 (1947).

The Mississippi cases[10] in support of the view that in the absence of some open, notorious act of ouster and adverse possession, the possession of a tenant in common is presumed to be the possession of all such tenants date back to 1846.[11] This rule was restated as the law in the *Peeples* case, but it is difficult to bring the *Peeples* case within the doctrine.

Perhaps the earliest of the Mississippi cases which seem to be similar to the *Peeples* case is that of *Hignite v. Hignite*.[12] There the defendant in a bill for partition was in possession of the land in question. He claimed that he held the land adversely to his cotenant, under a deed from his mother, the deceased owner's widow. The deed had not been recorded. There was no proof that the plaintiff had notice of the deed. The defendant's possession was held not to be adverse to the plaintiff.

In *Alsobrook v. Eggleston*[13] a cotenant in possession of the land had recognized the rights of his cotenants by holding under a deed conveying only a one-half interest. This cotenant endeavored to set up this character of occupancy as an assertion of an adverse holding against his cotenants. The occupancy in this type of situation is ordinarily presumed to be permissive, and no notice having been brought to the cotenants that their title was denied, the presumption was recognized.

Bentley v. Callaghan[14] cites the two cases noted above, and illustrates that the doctrine as to adverse possession by a cotenant against a cotenant extends to the relationship of mortgagor and mortgagee. The interesting fact in the *Bentley* case is the existence of both relationships between the two parties. The mortgagee was also a cotenant of the mortgagor who claimed by adverse possession for more than ten years.

In accord with the preceding authorities are those involving a purchase by one cotenant at a foreclosure sale[15] or at a tax sale.[16] The fiduciary relationship of cotenants is such that it is not consistent with good faith or with the duty which each owes to the other that either should

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[10]James v. Rowan, 6 S. and M. 393 (Miss. 1846); Day v. Davis, 64 Miss. 253, 8 So. 203 (1886); Hignite v. Hignite, 65 Miss. 447, 4 So. 345 (1888); Alsobrook v. Eggleston, 69 Miss. 833, 13 So. 850 (1892); Bentley v. Callaghan's Ex'r, 79 Miss. 302, 30 So. 709 (1901); Watson v. Vinson, 108 Miss. 600, 67 So. 61 (1915); Humphrey v. Seale, 125 Miss. 207, 87 So. 446 (1921).

[11]James v. Rowan, *supra* note 10.

[12]Hignite v. Hignite, *supra* note 10.

[13]Alsobrook v. Eggleston, *supra* note 10.

[14]Bentley v. Callaghan's Ex'r, *supra* note 10.

[15]Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317 (1902); Beaman v. Beaman, 90 Miss. 762, 44 So. 987 (1907); Watson v. Vinson, 108 Miss. 600, 67 So. 61 (1915).

[16]Fox v. Coon, 64 Miss. 465, 1 So. 629 (1886); Robinson v. Lewis, 68 Miss. 69, 8 So. 258 (1890); Cohea v. Hemingway, 71 Miss. 22, 14 So. 734 (1893); Clark v. Rainey, 72 Miss. 151, 11 So. 499 (1894); Falkner v. Thurmond, 23 So. 584 (Miss. 1898); Ford v. Smith, 162 Miss. 138, 137 So. 482 (1931); Clausell v. Riley, 188 Miss. 647, 196 So. 245 (1940); Campbell v. Herod, 193 Miss. 17, 7 So.2d 880 (1942).

purchase and set up against the other an outstanding adverse title. Hence a conveyance of such a title to one tenant inures to the benefit of all, provided the others contribute a proportionate part of the cost.

In *Wyatt v. Wyatt*[17] a father and his children were cotenants of a certain estate. The father secured a foreclosure of a deed of trust thereon and became the purchaser at the sale. The court held that the father secured no greater interest than he previously had in the property, because of the relation of cotenancy. *Watson v. Vinson*[18] is identical in fact, situation and result with the Wyatt case.

Beaman v. Beaman[19] involves a purchase by a cotenant in the name of his wife, of land sold under a trust deed. This purchase was held to inure to the benefit of all the cotenants. The inability of the cotenant to purchase for himself thus extends to his wife.

In the case of *Cohen v. Hemingway*[20] a tenant in common purchased a tax title on the common property. The court held that this act merely extinguished the tax title for the benefit of all the owners, and the extent of the right of the purchaser was to charge the cost on the common property. All the cases are as a practical matter identical in principle and the latest decision, *Campbell v. Herod*[21] is similar to the *Cohea* case.

These cases, involving a purchase by one cotenant at a foreclosure sale or at a tax sale, shows the strength of the fiduciary relationship existing between cotenants. They tend to prove that this relationship, which seems to have been overlooked in the *Peeples* case, is still a very strong one indeed.

III. Conclusion

No Mississippi case[22] prior to the *Peeples* case could be used as precedent for the decision, and no case since 1923[23] has followed it. In addition, there exists a long line of cases[24] which firmly support the rule which prevents one cotenant from acquiring a title in himself to the common estate without an actual ouster or notice of the assertion of the hostile claim.

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[17]Wyatt v. Wyatt, *supra* note 15.
[18]Watson v. Vinson, *supra* note 15.
[19]Beaman v. Beaman, *supra* note 15.
[20]Cohea v. H. Hemingway, *supra* note 16.
[21]Campbell v. Herod, *supra* note 16.
[22]The only precedent seriously cited by the attorneys for the appellee was that of Gardiner v. Hinton, *supra* note 6.
[23]Farnsworth v. O'Neal, *supra* note 8; Davis v. Gulf Refining Co., *supra* note 9; Thomasson v. Kinard, 153 Miss. 398, 121 So. 109 (1929); McDonald v. Roberson, 204 Miss. 737, 38 So.2d 189 (1948).
[24]Note 10 *supra*.

Peeples v. Boykin is inconsistent with the general rule as to adverse possession by a cotenant against a cotenant,[25] and other decisions of the Mississippi Supreme Court. The purpose of the recording acts is merely to afford protection to subsequent purchasers, and the record of a conveyance which purports to transfer the whole property to one cotenant is not sufficient to charge the others with notice of the former's claims. In the opinion of the writer, there is a good possibility that the *Peeples* case will at some future date be overruled by the Mississippi Supreme Court.

An indication of a trend in this direction is the opinion in the case of *McDonald v. Roberson.*[26] It involved the holding of property by one child under an invalid deed from her father. The deed was testamentary in character and conveyed no title. The child retained complete and exclusive possession of the property under claim of title for over ten years.

The court held that the tenants in common had actual knowledge of the purported deed and of its execution. The court further stated that, "The soundness of the opinion in *Peeples v. Boykin* has been frequently questioned, and we have mentioned it in order to disclose that we do not base our present decision upon it."[27]

Charles B. Henley

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[25]TIFFANY, *Op. Cit. supra* note 2, at 532.
[26]McDonald v. Roberson, *supra* note 23.
[27]McDonald v. Roberson, *supra* note 23, at 190.

LEGISLATION

SPECIAL HIGH SCHOOL DISTRICTS IN MISSISSIPPI

Nature and Types of Public School Districts in Mississippi

School districts in Mississippi do not have a corporate existence but are rather agencies or political subdivisions of the state and enjoy only such privileges and liabilities as are conferred on them by statute.[1] At the present time Mississippi has seven types of public school districts: (1) common school districts[2] which are the ordinary rural school districts usually containing nine square miles;[3] (2) consolidated districts which are formed by the consolidation of two or more districts and contain an area of not less than ten square miles and in which authority to transport pupils is granted;[4] (3) special consolidated districts containing not less than twenty-five square miles and in which is located more than one school under the control of the trustees of the district;[5] (4) municipal separate districts which contain territory both within and without a municipality;[6] (5) rural separate districts composed of an unincorporated district containing property of an assessed valuation of not less than $200,000 or an unincorporated district containing not less than sixteen square miles in which a free public school is maintained for not less than seven months with an average of not less than twenty-five pupils;[7] (6) county high school districts which are established by the county school board when by consolidation, or otherwise the county or a portion of it is left without a high school;[8] (7) and the most recently authorized type, the special high school district, which is formed by consolidating the territory and high school departments of the first five above named educational subdivisions.[9] It was authorized by statute in 1948. Its purposes are stated as follows:

> In recent years Mississippi, along with other states, has faced a serious problem with its small high schools. Many rural high schools have decreased to the point where reorganization is necessary. Prior to 1948 the only provision our state had for enlarging a high school district was by consolidating school districts including both high and elementary grades. Special consolidated school districts could be organized with one central high school and with two or more elementary schools out in the district. However, under this plan, all schools in the district are under one board of trustees and operated as one consolidated school. House Bill 686 was enacted for the purpose of consolidating high schools without interferring with or disturbing present elementary school district organization or administration.[10]

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[1]Sheedy v. State, 152 Miss. 82, 118 So. 372 (1928); *cf.* Stevens v. Brookhaven Municipal Separate School District, 5 F. Supp. 629 (S.D. Miss. 1934).

[2]Miss. Code § 6295 (1942).

[3]Brookings Institution Report on State and County Government in Mississippi (1932).

[4]Miss. Code § 6295 (1942).

[5]*Ibid.*

[6]*Ibid.*

[7]*Ibid.*

[8]Miss. Code § 6448 (1942).

[9]Miss. Code § 6448-01 (1942).

[10]Letter from J. M. Tubb, State Supt. of Education to the writer, dated July 29, 1949.

Procedure for Establishing Special High School Districts

County school boards creating school districts must look to the statute which empowers them to create that type of district and follow the procedure which the statute requires.[11] The instant statute requires a petition containing (1) a description, by sections, of the land to be included in the district, (2) a request that the district be established, and (3) subscription to it by a majority of the qualified electors of the proposed district.

Because the county school board can speak only through the minutes of its meetings, it is important that the minutes show all the jurisdictional facts which the statute requires.[12] The board must find that the petition was signed by a majority of the qualified electors of the proposed district and that the petition requested the establishment of the special high school district; give an adequate description of the land and the exact location of the school building. It must then adjudicate that the district is thereby established.[13]

Limitation of Indebtedness

Upon petition of a majority of the qualified electors residing in a special high school district, the board of supervisors may issue bonds of the district, in the same manner as other bonds are issued, to erect, repair and equip school buildings, teachers' homes, school barns, to obtain transportation vehicles, and to purchase land for the school. This indebtedness, principal and interest, is to be retired by a special tax levy. By giving trustees of special high school districts all the powers of trustees of consolidated and special consolidated district trustees,[14] the trustees of the special high school district are empowered to borrow money on negotiable notes, by and with the consent of the board of supervisors.[15]

The construction of statutory and constitutional debt limitations often raise serious questions when the boundaries of districts are coterminous or overlapping.[16] It is often difficult, in the absence of specific statutory provisions, to determine whether the subdivisions are to be treated independently, each being entitled to levy the maximum permitted by law, or whether the property within the district may be subjected to taxation only in the amount set as the maximum for the district. In Mississippi the statute of general application removes this ambiguity:

> No school district . . . shall hereafter incur any debt which added to its then outstanding indebtedness, both bonded and floating, shall result in the imposition upon any of the property of the district of any indebtedness for school purposes of more than fifteen per centum of the assessed valuation of such property. . . .[17]

Before bonds of the district are issued there must be a petition submitted to the board of supervisors, requesting their issuance, signed by a majority of the qualified electors of the district. The board must then adjudicate the necessary jurisdictional facts: that (a) the district has been legally organized and is in exist-

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[11]Leech v. Wileman, 179 Miss. 836, 177 So. 12 (1937).
[12]*Ibid.*
[13]Miss. Code § 6448-02 (1942).
[14]Miss. Code § 6448-04 (1942).
[15]Miss. Code § 6306 (1942).
[16]See Note 94 A.L.R. 818 (1935).
[17]Miss. Code § 4329 (1942).

ence, (b) the petition has been signed by a majority of the qualified electors of the district, and (c) the amount of the bonds will not exceed the statutory debt limit.[18] After these facts have been adjudicated, it is mandatory that the board issue the bonds.[19]

Prerequisites for Tax Levy

When the annual county tax levy is made, the board of supervisors may make a levy on all of the taxable property in the special high school district in an amount not to exced ten mills for the support and maintenance of the school. The total tax levy for the county for the support of schools must not exceed the maximum for any district within the special high school district.[20]

In determining the maximum for the different types of districts it must first be noted that the board of supervisors is authorized to levy a tax of ten mills throughout the county, exclusive of separate districts.[21] It may also levy an additional ten mills in any consolidated, special consolidated, or common school district which may be increased as the countywide levy is decreased so long as the total levy in any one year does not exceed twenty mills.[22] Municipal separate districts may levy fifteen mills unless the municipality is of less than 4,000 population in which case the maximum levy is twenty mills.[23]

Because the maximum levy for the several types of districts is not uniform, when two or more districts having different maxima are consolidated into a special high school district, it will be necessary for the board of supervisors to adjust the levy so that the maximum for any one district will not be exceeded.

Conclusion

Mississippi, with 82 counties, has, according to latest available figures, a total of 1,189 school districts divided into seven types.[24] The need for consolidation of these districts into larger more efficient units is obvious. To meet this need the legislature has provided for the establishment of consolidated and special consolidated or "super" consolidated districts. The integration of high school departments was attempted first by provision for county high school districts, and in 1948 for special high school districts. This approach to the problem has led to complexity and confusion in the law of school districts which can only be erased by a complete revision of the entire system.

The effect of the special high school district statute will probably be the consolidation of a few districts, but the reluctance of the people to change the existing system will defeat its establishment in other areas where the need for integration of the educational plant is equally as great. The special high school district is not a substitute for the needed complete revision of school districts, but is an attempt to improve the present outmoded and inefficient system.

G. E. Estes, Jr.

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[18]Miss. Code § 6448-07 (1942).
[19]Board of Supervisors of Quitman County v. State *ex rel.* Crisler, 38 So.2d 314 (Miss. 1949).
[20]Miss. Code § 6448-06 (1942).
[21]Miss. Code § 9881 (1942).
[22]Miss. Code § 9882 (1942).
[23]Miss. Code § 9885 (1942).
[24]Graves, American State Government 822 (3d ed. 1946).

RECENT DECISIONS

Bills and Notes—Liability of Drawee Who Pays Check on Unauthorized Indorsements of Payee's Agent

Drawee bank paid a series of checks presented to it by payee's agent. The agent was not authorized to indorse or present the checks for payment. Payee brings action against the drawee as assignee of any rights and causes of action drawer had against the drawee arising out of these transactions. Held: Drawer's liability to payee was discharged when the checks were paid by the drawee to the agent and hence drawer had no cause of action which it could assign to payee. *Strickland Transportation Company v. First State Bank of Memphis,* 214 S.W.2d 934 (Texas 1948).

The Texas courts have previously denied payee the right to proceed directly against a drawee bank for the payment of checks on forged or unauthorized indorsements.[1] Such denial is grounded upon the principle that there is no privity of contract existing between the parties.[2] That jurisdiction, by virtue of the instant case, now deprives the drawer of recourse to the drawee bank, and consequently the drawer's assignee.

The majority buttressed their decision on this point by citing nine cases from five jurisdictions involving actions by the *payee* against the *drawer.*[3] Each of these cases treated the drawer's debt as fully paid when the checks were honored by the drawee bank,[4] and refused to hold the drawer liable for the infidelity of the payee's agent. It is of particular note, however, that of the five jurisdictions to which reference is made, every one allows the payee in such a case to proceed directly against the drawee.[5] Therefore, it would seem that those cases considered by the majority announce a principle totally inapplicable to the question in controversy. Here, we are primarily concerned with the drawer's rights against the drawee where checks bearing unauthorized indorsements have been debited to his account.

The relationship existing between a bank and its depositors is that of debtor and creditor.[6] This bond thrusts upon the bank the duty of expending funds of the depositor only upon his express order and strictly according to instructions.[7] If the bank pays a check drawn to the order of a specifically named payee on a forged or

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[1]Fidelity & Deposit Co. v. Fort Worth Nat. Bank, 65 S.W.2d 276 (Tex. Comm. App. 1933).

[2]*Accord,* Sinclair Refining Co. v. Moultrie Bkg. Co., 45 Ga. 768, 165 S.E. 860 (1932).

[3]McFadden v. Follrath, 114 Minn. 85, 130 N.W. 542 (1911); Morrison v. Chapman, 155 App. Div. 509, 140 N.Y.S. 700 (1913); Burstein v. Sullivan, 134 App. Div. 623, 119 N.Y.S. 317 (1909); Sage v. Burton, 84 Hun. 267, 32 N.Y.S. 1122 (1895); Birkett v. Postal Telegraph-Cable Co., 186 N.Y. 591, 79 N.E. 1101 (1905); Mills v. Hurley Hardware & Furniture Co., 129 Ark. 350, 196 S.W. 121 (1917); Kansas City, M. B. R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395 (1892); Union House Furnishing Co. v. National Bank of Commerce, 53 S.W.2d 1067 (Mo. App. 1932); Indemnity Mutual Marine Assur. Co. v. Powell & O'Rourke Grain Co., 216 Mo. App. 673, 271 S.W. 538 (1925).

[4]*Contra:* Lawrence J. Kern v. Panos, 177 So. 432 (La. 1937); First Nat. Bank of Washington v. Whitman, Adm'r., 94 U.S. 343 (1870); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1934); Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570 (1930).

[5]Note, *Banks and Banking—Payment of Checks on Unauthorized Indorsements,* 1 Baylor L. Rev. 351 (1949).

[6]9 C. J. S. 557.

[7]5 Michie, Banks and Banking, § 277a (Perm. ed. 1931).

unauthorized indorsement it does so at its peril,[8] for this is not according to the depositor's direction and the bank is liable for the amount of such checks.[9]

Upon a thorough consideration of these rules in a jurisdiction where the payee is prohibited from filing a direct suit against the drawee, the allowance of a right of action against the latter by the drawer would neither be unreasonable in law nor contrary to sound business policy.

Leon L. Porter, Jr.

Constitutional Law—Delegation of Judicial Powers—Cancellation by Executive Officer of State's Claim to Tax Lands

The land commissioner, with the approval of the attorney general, is authorized to strike from the list of lands sold to the state for delinquent taxes, lands sold under a tax sale which is void.[1] The state cancels all its title and claim to them, except for the claim for taxes due at the time of the sale and accruing afterwards. Acting under this statute, the land commissioner cancelled the state's claim to lands which were owned by the plaintiff. Plaintiff later brought suit to cancel the tax sale to the state as a cloud upon his title.[2] Held: The land commissioner had already cancelled the state's claim under a properly delegated and defined power. *State v. Southern Pine Co.*, 205 Miss. 80, 38 So.2d 442 (1949).

Miss. Const. § 2 provides that no member of one department shall exercise powers belonging to another department. Plaintiff contended that these sections had been violated by the statute in question.

The constitutional concept of separation of powers is an abstraction which cannot be completely applied in practice.[3] This principle is complied with if the whole power of no two or more departments is assigned to the same hands.[4] The accepted view today is that rigid adherence to this doctrine must be sacrificed to the interests of a smoothly operating government.[5] The object of the Federal and state constitutions was to provide for three departments of government: the legislative, which is to make laws; the executive, which is to approve and execute them; and the judicial, which is to enforce them.[6] Sections 1 and 2 of the Mississippi Constitution of 1890 provide for the separation of powers.[7]

What constitutes a judicial act is determined in the light of common law usage.[8] It is well established that an act attacked on the grounds of unconstitutionality has the benefit of a presumption of constitutionality,[9] and if it is capable of two con-

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[4]O'Donoghue v. U.S., 289 U.S. 516 (1933); Dreyer v. Ill., 187 U.S. 71 (1902); 158 So. 777 (1935); DeCamp v. Archibald, 50 Ohio St. 618, 35 N.E. 1056 (1893).

[8]Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 182 Pac. 293 (1919); 2 Morse, Banks and Banking, § 474 (6th ed. 1928).

[9]7 Am. Jur. 427.

[1]Miss. Code § 4073 (1942).

[2]Miss. Const. § 1 provides for the division of the government into three departments; legislative, judicial, and executive.

[3]Weaver, Constitutional Law and its Administration § 114 (1946). Jackson County v. Neville, 131 Miss. 599, 95 So. 626 (1923).

[5]Panama Rfg. Co. v. Ryan, 293 U.S. 388 (1935).

[6]Martin v. Hunter, 1 Wheat. 304 (U.S. 1816).

[7]*Supra* note 2.

[8]State v. Noble, 118 Ind. 350, 21 N.E. 244 (1889); State v. Tann, 172 Miss. 162,

[9]Thompson v. Box, 147 Miss. 1, 112 So. 597 (1927); Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910).

structions, the one which will uphold its validity must be adopted.[10] It is not the duty of the court to pass upon the wisdom of a legislative act.[11]

Delegation of judicial type functions has long been permitted where the delegated powers are to be exercised within the bounds of a definite standard.[12] However, there are some functions which the courts have held to be so exclusively powers of the court that they could not be delegated. These direct intrusions upon the judiciary have been resisted. The Mississippi court has even recently declared that the determination under a taxing statute of what constitutes "doing business" within the state is a matter for judicial, not legislative determination.[13] Also, an act which gave certain parties the right to a new trial after final adjudication of a suit was held to be a usurpation of judicial power.[14] But where the legislature authorized the repayment of money to a person who had been adjudicated liable, and had paid the amount to the state, the act was held to be constitutional because there was nothing to prevent the state from recognizing a moral obligation and making restitution.[15]

Delegation was proper, as being within the bounds of a definite standard, when an act set up a procedure for refunding, by the attorney general and tax commissioner, of taxes erroneously paid; even though the amount refunded was a contested claim.[16] A statute providing for the supervision and inspection of public buildings and giving the chief inspector power to issue subpoenas and compulsory process, and fine for contempt has been approved by the court.[17] Authority for the governor and a circuit judge to approve the amount due an auditor for a county audit has been approved upon the basis that this was not a judicial question within the meaning of the constitution.[18] The line of demarcation between departments is indefinite, and practical operation of the government necessarily requires that each department exercise some functions that strictly belong to another.[19]

If the statute is mandatory as to its effect, and the only discretion exercised by the administrative officer is the determination of a preliminary fact, that function alone does not render his act judicial.[20] A mere ministerial act does not partake of the nature of a judicial act even though it requires discretion.[21]

In the principal case the court seems to have reached a logical result. The statute provides an efficient and fair method by which the state can disclaim title to

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[10]Memphis Natural Gas Co. v. Gully, 8 F. Supp. 169 (S.D. Miss. 1934); Robinson v. State, 143 Miss. 247, 108 So. 903 (1926); Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

[11]Board of Trustees v. Waugh, 105 Miss. 623, 62 So. 827 (1913).

[12]Kantor v. Stone, 203 Miss. 260, 34 So.2d 492 (1948).

[13]Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So.2d 22 (1948). For a leading case on the delegation of legislative powers to the judiciary, see California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So.2d 542 (1946), *suggestion of error overruled,* 200 Miss. 824, 28 So.2d 120 (1946).

[14]Lawson v. Jeffries, 47 Miss. 686 (1873).

[15]Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

[16]Miss. Code § 9979 (1942); Pearl River County v. Lacey Lumber Co., 124 Miss. 85, 86 So. 755 (1921).

[17]Miss. Code § 3883 (1942), State v. Board of Sup'r., 141 Miss. 701, 105 So. 541 (1925).

[18]Miss. Code § 3995 (1942), Jackson County v. Neville, 31 Miss. 599, 95 So. 626 (1923).

[19]Jackson County v. Neville, *supra* note 18.

[20]Kantor v. Stone, 203 Miss. 260, 34 So.2d 492 (1948); Commercial Bank v. State, 4 Smedes & M. 439 (Miss. 1845).

[21]Rice v. Parkman, 16 Mass. 326 (1820); State v. Miller, 144 Miss. 614, 109 So. 900 (1926); Bacot v. Board of Sup'r., 124 Miss. 231, 86 So. 765 (1921).

lands sold under void tax sales. Expensive and useless litigation is avoided. Although the discretion exercised by the land commissioner has elements of both legislative and judicial functions, it is a discretion which is carefully bounded. The delegated powers must be performed under specific standards and with the advice and consent of the attorney general.[22]

Robert J. Hobby

Constitutional Law—Licenses—Arbitrary and Unreasonable Requirements in Statutes Regulating Public Accountants

Plaintiffs sued to recover unpaid balance of a fee earned by preparation of defendant's tax returns. Laws[1] regulating public accountants and prescribing means of certification prohibited the preparation of tax returns for fees unless the accountant was duly certified.[2] Defendant, relying on this provision of the statute, insisted that he incurred no liability for fees because plaintiffs were not licensed to do that kind of work. Held: Requirement that only certified public accountants may prepare tax returns for compensation is in excess of the police power, a denial of the property right to engage in a business, and tends to create a monopoly. *Moore v. Grillis,* 39 So.2d 505 (Miss. 1949).

The rationale of this case seems to be that, although the police power of the legislature[3] extends to the regulation of trades and professions,[4] the requirements of this statute as applied to accountants are unreasonable exercises of that power.

This is a peculiar reversal of the previous stand taken by the court in several decisions[5] where they said that their judgment could not be substituted for that of the legislature if the power to regulate the field is within the police power.

It is clear from a number of decisions that the police power of the legislature covers regulation of the field of public accounting, and also includes the power to prescribe punishment for false representations as to certification.[6]

From the language of analogous decisions from other states, the Mississippi court has drawn a number of general constitutional objections to the requirement that accountants who fill out income tax returns for the public must be certified. None

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[22]Miss. Const. § 173 provides that the qualifications for attorney general shall be the same as for judges of the circuit or chancery court.

[1]Miss. Code §§ 8905-8913 (1942).

[2]*Ibid* § 8912. Lawyers are also permitted to prepare tax returns for compensation. There are approximately 1439 resident members of the bar, and 126 members of the Mississippi Society of Certified Public Accountants.

[3]Recognized by Miss. Const. Art. III § 6.

[4]Clark v. State, 169 Miss. 369, 152 So. 820 (1934), cited and discussed by Justice Hall in his vigorous dissent in the instant case at 39 So.2d 514. *But see* Wilby v. State, 93 Miss. 767, 47 So. 465 (1908).

[5]Clark v. State, *supra* note 4; Mississippi State Tax Comm. v. Flora Drug Co., 167 Miss. 1, 148 So. 373 (1933), where the court said: "Statutes cannot be declared invalid on the ground that they are unwise, unjust, or unreasonable, or immoral or because they are opposed to public policy, or the spirit of the constitution."; State v. Board of Sup'rs. of Grenada County, 141 Miss. 70, 105 So. 541 (1925); State v. J. J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912); Bobo v. Board of Levee Comm'rs., 92 Miss. 792, 46 So. 819 (1908).

[6]State v. Deverges, 153 La. 349, 95 So. 805 (1923); Henry v. State, 29 Tex. Crim. Rep. 67, 260 S.W. 190 (1924); People v. Marlowe, 40 N.Y. Crim. Rep. 446, 203 N.Y.S. 474 (1923); Lehman v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94 (1922).

of the authorities cited by the court seem to be concerned with the question as presented here. The statutes of Tennessee and Illinois[7] were invalidated because of the requirement that one not certified could not be employed as an accountant or bookkeeper by more than one person. There is no such restriction in the Mississippi statute. An Oklahoma act was also held to be unconstitutional,[8] but that statute did not prohibit persons other than certified public accountants from filing income tax returns for compensation.

A recent Georgia case,[9] not referred to by the court, seems to present a problem very similar to the present one. An accountant had sued to recover fees for work done, which included the preparation of income tax returns. The court decided the case on a pleading question, but said that where the purpose of the statute is to regulate and control the occupation under the police power, the legislature may make an examination, payment of a license fee, and the posting of a bond conditions precedent to the practice of accounting. Those who would engage in such practice without complying with the provisions of the statute would "suffer the peril of having all their contracts declared void and unenforceable and the further peril of being indicted for a crime." Thus the Georgia court deviated from the main pleading question to uphold the validity of that statute on the theory that the requirements set forth by the Georgia act consisted of conditions precedent to the practice of accountancy.

The Mississippi court, on the other hand, apparently recognizes a class of uncertified public accountants[10] immune from privilege taxes, qualificational requirements, and from all existing statutory control. In the final analysis, the judgment of the legislature as to public need and protection in the exercise of its police power was replaced by the opinion of the court.

Elwyn Darden

Constitutional Law—Organized Baseball as Interstate Commerce Under Anti-Trust Laws

Plaintiff, a professional baseball player who had previously violated his contract by going to a Mexican league, brought this action to recover treble damages under the anti-trust laws. Plaintiff contended that the defendants, officials of organized baseball, had violated the anti-trust laws in suspending him and prohibiting his playing in American organized baseball. Defendants contended that the Federal court did not have jurisdiction because interstate trade of commerce was not involved. Held: Allegations of the complaint that defendants operated baseball teams which travelled between states for the purpose of playing baseball games and made contracts with radio broadcasting and television companies to send broadcasts or pictures of the games across state lines, sufficiently charged that defendants were engaged in interstate commerce within the anti-trust laws to give the Federal Courts jurisdiction. *Gardella v. Chandler et al.*,* 172 F. 2d 402 (C.C.A. 2d 1949).

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[7]Tenn.: Campbell v. McIntyre, 165 Tenn. 47, 52 S.W.2d 162 (1932); Ill.: Frazer v. Shelton, 320 Ill. 253, 150 N.E. 696 (1926). The Illinois statute did not provide for the certification of resident citizens of Illinois who were not then practising accountancy.

[8]In State v. Riedel, 109 Okla. 35, 233 Pac. 684 (1924).

[9]Knight Drug Co. v. Naismith, 73 Ga. App. 973, 38 S.E.2d 87 (1946).

[10]"The effect of Section 8912 is that certified public accountants are put in a privileged class. . . ." Moore v. Grillis 39 So.2d 505, 507 (Miss. 1949). But this would appear to contradict a prior statement that the legislature "did attempt to prohibit the 'practice of the profession (of accountancy) by those not certified.'" *Ibid.*

*This case has now been compromised.

The organized business of giving exhibitions of baseball games between cities, commonly referred to as organized baseball, has relied upon the decision of the *Federal Baseball* case[1] as protection against suits under the anti-trust laws.[2] That case held that the transportation of ball players from one state to another under the control and discipline of baseball teams was merely incidental to the games played in different states, that the exhibitions, although given for money, were not commerce, and the making of restrictive contracts with ball players and other alleged acts by baseball leagues were not subject to the anti-trust laws. That has been the generally accepted view since 1922 and organized baseball has relied heavily upon that decision.

At first glance, the principal case appears to overrule the *Federal Baseball* decision, but after a careful examination, the latter is found to be the law applicable when limited to the facts of that particular case or similar cases where the only incident relied upon to bring baseball within interstate commerce is interstate travel.[3]

Yet today there are many incidents so closely related to organized baseball as to make them a part of the game itself. The baseball clubs secure large monetary returns from radio and television broadcasts which are themselves interstate commerce. The money received from these activities constitute such a large portion of a club's gross income as to warrant consideration. When a radio or television broadcast is made of a game, the game is not only a local activity but is spread over many states and to foreign countries. Judge Hand compared the broadcasts to a stage play, with the players being the actors and the listeners being the audience.[4] These factors limit greatly any possible application of the *Federal Baseball* doctrine.

There are many arguments, both pro and con, on the question of whether organized baseball is engaged in interstate commerce and therefore within the anti-trust laws. Judge Chase, in the dissenting opinion of the principal case, ably states the negative to this question.[5] His main reasons are:

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[1]Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[2]Although the action was brought under the Anti-Trust laws, that aspect of the case is omitted in this article because that issue is primarily dependent upon the interstate commerce aspect of organized baseball. The action was based upon violations of the Sherman Anti-Trust Act, §§ 1-3, as amended, 15 U.S.C.A. §§ 1-3, and the Clayton Act, §§ 2-4, as amended, 15 U.S.C.A. §§ 13-15. The material provisions of those sections are summarized as follows:

§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is illegal.

§2. Every person monopolizing, or attempting to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the states shall be guilty of a misdemeanor.

§3. Trusts in territories or the District of Columbia are illegal.

§13. Discrimination in price, services, or facilities where the effect of the discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition is prohibited.

§14. Any sale, contract for sale, or such condition, agreement, or understanding which substantially lessens competition or tends to create a monopoly in any line of commerce is unlawful.

§15. Any person injured in his business or property by reason of violation of the Anti-Trust laws may sue therefor in any district court of the United States in the district in which the defendant resides, without respect to the amount in controversy, and shall recover threefold the amount of damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[3]Gardella v. Chandler, 172 F.2d 409 (C.C.A.2d, 1949).

[4]*Id.*, pp. 407, 408. *Cf:* Pantomimic Corp. v. Malone, 238 F. 135 (C.C.A.2d, 1916).

[5]*Supra* note 3, pp. 403-407.

1. A controlling decision of the Supreme Court requires such a holding.[6]

2. Even if that decision were distinguishable, there was no restraint upon commercial competition in the marketing of goods and services in interstate commerce, which was within the category of restraints which were illegal at common law. This should include the famous reserve clause of player's contracts.[7]

3. Baseball teams could not exist without the restraints imposed.[8]

4. The public benefits from the restraints imposed because lower admission prices result, as well as better competition.

On the other hand, the majority stated that:

1. The overall character of baseball has changed so much since the *Federal Baseball* case that it is no longer controlling.

2. Although the *Federal Baseball* case has never been explicitly overruled by the Supreme Court, it has overruled the precedents upon which that decision was based. The commerce power of Congress is not affected because those activities of organized baseball, affecting or in interstate commerce, constitute but a small percentage of the total activities.[9]

3. Congress intended to use all the power conferred upon it by the commerce clause when it enacted the Sherman and Clayton Acts.[10]

4. The interpretation of Congress's power under the commerce clause[11] has changed too much to allow the *Federal Baseball* case to control.

Organized baseball is a large business. Its structure is comparable to a large corporation doing business in every state.[12] There is no business which is so closely interrelated and interdependent as organized baseball. There is a continuous interstate activity among the teams of the various leagues. The very existence of component teams depends upon the income from games played in other states and cities.

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[6]*Supra* note 1.

[7]A clause in the player's contract whereby he becomes bound to the club he contracts with for the duration of his stay in organized baseball or until that club sells, trades, or releases him. The club generally controls a player's minor league training and playing under this clause by assigning him to various minor leagues affiliated or operated teams.

[8]*Supra* note 3, p. 415.

[9]Roland Electric Co. v. Walling, 326 U.S. 657 (1945); Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946); NLRB v. Cleveland Cliffs Iron Co., 133 F.2d 295 (C.C.A.6th 1943); Walling v. Connecticut Co., 154 F.2d 552 (C.C.A.2d 1946); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1945).

[10]Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1931); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1939); United States v. Frankfort Distilleries, 324 U.S. 293 (1944); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1947); United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944).

[11]U. S. Const. Art. 1, § 8; United Mine Workers of America v. Coronada Coal Co., 259 U.S. 344 (1922); Federal Trade Commission v. Claire Furnace Co., 285 F. 936 (App. D.C. 1923). *Cf:* United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728 (W.D. Ky. 1941); Fleming v. Easton Pub. Co., 38 F. Supp. 677 (E.D. Pa. 1941).

[12]For a general summary of the business structure of organized baseball see note 3, *supra,* pp. 403-404.

Every team is merely an ambulatory organization, although it plays half of its scheduled games in the city which it represents.

The constitutional grant of power over commerce is now interpreted as enabling Congress to enact all appropriate laws for the protection and the advancement of commerce among the states, whatever measures Congress might reasonably think adapted to that end, without regard as to whether particular activities, in themselves, are intrastate or interstate.[13] There is no mechanical formula which may now exclude matters that might be called "local" from these principles. In our present day economy the interstate and intrastate aspects of American business are inseparable. The mere playing of a ball game can not be isolated from the many other activities which make the game possible, so as to exclude organized baseball from the regulation of interstate commerce. Big league baseball is not only a local competitive sport but also a great commercial enterprise conducted on a national scale. Because its own officials conduct the business on that basis, it should be subject to equivalent anti-trust law limitations.

Albert Jordan, Jr.

Criminal Law—False Pretenses—Limitations on Mississippi Bad-Check Law

A Mississippi statute[1] provides that any person who, with intent to defraud, issues a bad check obtaining thereby any property of value shall be guilty of a misdemeanor; and that proof of insufficient funds is prima facie evidence of intent to defraud. Prosecuting witness contracted with defendant to perform certain services. Upon completion of the work, defendant gave him a check which was subsequently dishonored and returned marked "no account." Held: Because the check was given in discharge of a pre-existing debt, the bad-check law has no application here. A conviction would violate the constitutional prohibition against imprisonment for debt.[2] *Blakeney v. State,* 39 So.2d 767 (Miss. 1949).

At common law, there could be no conviction for uttering a worthless check. To be larceny, there must be a trespass.[3] It would not be cheating since there is no false public token.[4]

The purpose of statutes of this nature is not only to rectify the inadequacy of the common law but also to restrain and punish the fraudulent practice of issuing

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[13]United States v. Carolene Products Co., 304 U.S. 144 (1938); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Polish National Alliance v. NLRB, 322 U.S. 643 (1944); Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946); Wickard v. Filburn, 317 U.S. 111 (1942); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1947).

[1]Miss. Code § 2153 (1942), as amended, Miss. Laws 1948, c. 403: "If any person, with intent to defraud, shall make, issue and deliver . . . for value, any check . . . and thereby obtain . . . any money, goods, or other property of value, and have no funds or insufficient funds . . . and same shall not be paid . . . he shall be guilty of a misdemeanor. . . . Proof that such person had no funds or insufficient funds . . . shall be a prima facie evidence of such intent to defraud. . . ."

[2]Miss. Const. § 30.

[3]32 Am. Jur. 901.

[4]Williams v. Territory, 13 Ariz. 27, 108 Pac. 243 (1910).

bad checks. They seek to preserve the integrity of negotiable, commercial paper and to prevent the public nuisance resulting from the circulation of worthless checks.[5]

An earlier Mississippi bad-check law,[6] requiring neither intent to defraud nor knowledge of insufficient funds, and providing for dismissal of prosecution upon payment of check was held in *State v. Johnson*[7] to be a use of the criminal process as a debt-collecting agency, and therefore in violation of the constitutional prohibition against imprisonment for debt.[8]

With these infirmities in mind, the Mississippi Legislature in 1932 enacted the current law.[9] Its application and construction appears to be very limited. Convictions have been upheld only where the fraudulent check was given either prior to or concurrently with "value" received. Where there is the slightest possible basis for the finding of an extension of credit, giving rise to a debt, the statute has been held inapplicable. In *Moore v. State*,[10] where the defendant requested a loan from the prosecuting witness, who refused but agreed to cash a check and who received a bad check in return, the statute was held applicable. On the other hand, in a decision rendered on the same day[11] the court refused to sustain a conviction where the defendant had agreed to purchase certain machinery for cash and had given a bad check in payment for it only thirty minutes subsequent to its delivery.

The difficulty arises from the unwillingness of the court to conclude that the drawer obtains "value" when the fraudulent check is given in discharge of a pre-existing debt. It should be noted that the Mississippi Negotiable Instruments Law provides that an antecedent or pre-existing debt constitutes value.[12] However, a worthless check can never actually operate in satisfaction of a debt since the civil liability remains. Yet one who issues such a check does so for some presumed advantage or satisfaction to accrue to himself and certainly not for the purpose of benefiting the payee. The delay and inconvenience to the payee along with the supposed benefit to the drawer could constitute the required value.

The statute requires that there be a fraudulent intent. The fact of whether the payee actually does or does not suffer financial detriment has nothing whatever to do with the intent of the drawer of the worthless check. The intent should not be made to depend upon the success or failure of the fraudulent enterprise.

It is submitted that when a worthless check has been drawn, issued, and delivered to the payee, with intent to defraud and with knowledge of insufficient funds, the crime is complete. This being true, it is not the non-payment of the pre-existing debt for which the drawer is punished but rather the fraudulent issuance of the worthless check.

Joe R. Fancher, Jr.

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[5]Elliott v. Caheen Bros., 228 Ala. 432, 153 So. 613 (1934); Anderson v. Bryson, 94 Fla. 1165, 115 So. 505 (1927); Hollis v. State, 152 Ga. 182, 108 S.E. 783 (1921); *Ex parte* Myers, 119 Kan. 270, 237 Pac. 1026 (1925); State v. Avery, 111 Kan. 588, 207 Pac. 838 (1922).

[6]Miss. Code § 924 (1930).

[7]163 Miss. 521, 141 So. 338 (1932).

[8]*Supra* note 2.

[9]Miss. Laws 1932, c. 299.

[10]38 So.2d 693 (Miss. 1949).

[11]Broadus v. State, 38 So.2d 692 (Miss. 1949).

[12]Miss. Code § 66 (1942): "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Drainage Districts—Additional Assessment for Necessary Repairs—Benefits Implicit in Preservation

Plaintiff owned lands in higher end of drainage district. Repairs to canal at lower end became necessary, and plaintiff objected to an assessment on his property alleging that it did not bear a proper relation to increased benefits to his land. Held: Additional assessments for repairs may be made against all property in a district without regard to the landowner's actual benefits. *Buchanan v. Red Banks Creek Drainage District,* 39 So.2d 321 (Miss. 1949).

A drainage district is a political subdivision of the state[1] authorized under the police power[2] to exercise powers of eminent domain,[3] taxation,[4] and compulsory incorporation.[5] Landowners are protected by the limiting of assessments to benefits.[6]

It has been held that in new assessments no benefited lands could be exempted,[7] and that an additional improvement to the district outlet (not a repair) could not be assessed against upper landowners not additionally benefited by it.[8] Benefits must be direct and substantial, and not uncertain and speculative.[9]

The statute providing for new assessment for repairs has never been construed in Mississippi.[10] The Kentucky Court has said that benefits in the original proportion would be presumed in maintenance of a district which is a single system. "Once a taxpayer, always a taxpayer."[11] Illinois took an opposite view holding that assessments must be based on the then accruing benefits and not on the original assessment.[12]

Mississippi in adopting the single system theory held that the statute[13] makes no mention of ascertainable benefits except such as are implicit in preserving that which has been judicially determined to be an asset to the whole district. Since the assess-

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[1]Standard Oil Co. v. National Surety Co., 143 Miss. 841, 107 So. 559 (1926).

[2]Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

[3]State Highway Commission v. Yellow Creek Drainage District, 181 Miss. 651, 180 So. 749 (1938).

[4]Bedell v. Lassiter, 143 Fla. 43, 196 So. 699 (1940); *cf.* Huston v. Mayo, 120 Miss. 523, 82 So. 334 (1919) (drainage district not a taxing district within prohibition of Miss. Laws 1918, c. 209, § 2); Cox v. Wallace, *supra* note 2 (drainage taxes not required to be uniform under Miss. Const. § 112.

[5]Stevens v. Beaver Dam Drainage District, 143 Fla. 43, 86 So. 641 (1920).

[6]White v. Lake Cormorant Drainage District, 130 Miss. 351, 94 So. 235 (1922); People v. Allen, 330 Ill. 433, 161 N.E. 867 (1928); Crosby v. De Land Special Drainage District, 367 Ill. 462, 11 N.E.2d 937 (1937); People's Bank Liquidating Corp. v. Beashea Drainage District, 199 Miss. 505, 24 So.2d 784 (1946); *cf.* Tolar v. Bear Creek Drainage District, 141 Miss. 851, 106 So. 89 (1929) (equality of benefits not essential to formation of district).

[7]Gillis v. Indian Creek Drainage District, 155 Miss. 160, 124 So. 262 (1929).

[8]People v. Allen, *supra* note 6.

[9]Marshall v. Commissioners of Upper Cache Drainage District, 313 Ill. 11, 144 N.E. 321 (1924). *Contra:* Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449 (1920) (no exemption for lack of direct or exactly equal benefits).

[10]Miss. Code § 4689 (1942) (. . . no new assessment . . . unless . . . it becomes absolutely necessary in order to raise funds to preserve and maintain the improvements of the district).

[11]Henshaw v. Holt, 262 Ky. 19, 89 S.W.2d 313 (1935).

[12]Parke County Coal Co. v. Campbell, 140 Ind. 28, 39 N.E. 149 (1894).

[13]Miss. Code § 4689 (1942).

ment in the instant case far exceeded the proposed repairs, the court limited the burden to such amount.[14]

This limited affirmance seems to be at variance with the plain meaning of the statutes which state that assessment rolls when approved by the chancellor will stand as a final assessment of benefits,[15] and which give the commissioners authority to consume such assessments for improvements not exceeding benefits.[16] The legislature has stated that drainage laws shall be construed liberally and that a confirmation of assessment shall be conclusive that all prior proceedings were regular.[17]

The rule in Mississippi now is that additional assessments may be made on drainage lands regardless of actual benefits so long as the assessment bears mathematical proportion to the original assessment.

Lester F. Sumners

Evidence—Opportunity for Obtaining Search Warrant as Test of Reasonableness of Search and Seizure

Police watched the home of defendant for five days, then entered with a warrant for her arrest for running a disorderly house. Under it they searched her four-room house in which they found lottery tickets, lists, and records; and several cases of empty, opened, and unopened beer and whiskey bottles. They then obtained a warrant for conducting a lottery and for unlicensed sale of liquor. From defendant's conviction she appealed on the ground that the evidence of the lottery and the liquor was obtained unlawfully because the officers had no search warrant and because the warrant for arrest under which the officers acted did not include the latter offenses. Held: The search of an entire house at the time of service of the warrant for arrest charging operation of a disorderly house was not justified as an incident to a lawful arrest and violated the Bouse Act of the Maryland statutes.[1] *Johnson v. State,* 66 A.2d 504 (Md. 1949).

In jurisdictions where illegally obtained evidence is inadmissible, as in Mississippi,[2] the courts have allowed the introduction of evidence procured without a search warrant only if it was obtained incident to a lawful arrest and was the fruit of reasonable search and seizure. The primary test of reasonableness appears to have been extent.

Articles found on the person of the one arrested,[3] instruments of the crime of which he is charged,[4] deadly weapons,[5] vehicles of escape,[6] and all other articles

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[14]The assessment was one hundred per cent, or $93,516.75, while only $25,000 was needed.

[15]Miss. Code § 4689 (1942); Gillis v. Indian Creek Drainage District, *supra* note 7 (has force and effect of res adjudicata).

[16]Miss. Code §§ 4701, 4704, 4712, 4718 (securing all debts by lien on land).

[17]*Ibid.* § 4641.

[1]Md. Code, Art. 35, § 4A (Supp. 1935).

[2]Fulton v. Miss., 168 Miss. 30, 148 So. 346 (1933), construing Miss. Const. Art. III, § 23. *But see* Davis v. State, 175 Miss. 324, 166 So. 761 (1936), in which it was decided that illegally obtained evidence submitted by a private citizen is admissible.

[3]Hill v. State, 59 A.2d 630 (Md. 1948); Johnson v. Commonwealth, 304 Ky. 490, 200 S.W.2d 913 (1947); Carney v. U.S., 163 F.2d 784 (C.C.A. 9th 1947); Lewis v. State, 198 Miss. 767, 23 So.2d 401 (1945).

[4]Bruce v. Sibeck, 25 Cal. App.2d 691, 78 P.2d 741 (1938); Tamplin v. Beach, 49 Colo. 516, 113 P. 513 (1911); U.S. v. Mills, 185 F. 318 (S.D.N.Y. 1911) (Upheld

found in such close proximity to the defendant as to be considered within his immediate possession[7] have been held almost universally to meet these tests. Search of the car of the person arrested[8] and of the room wherein the arrest was made[9] have been upheld by a majority of the courts which have been called upon to rule on the legality of such search. Cases upholding further search and seizure, some times termed "roving explorations," are few in number[10] and subject to sharp

Courts explain this liberal interpretation of the constitutional guarantees as being a shield for the innocent rather than a refuge for the guilty.[11] They deny that it is their purpose to restrict search, but assert that they are merely placing a magistrate between the people and the arresting officer.[12]

Analysis of recent United States Supreme Court decisions lead to the conclusion that the element of extent as a test of reasonableness is becoming secondary to another consideration: whether from a standpoint of time it would have been reasonably possible for the officer to procure a search warrant before making the arrest.[13]

In 1948 the Supreme Court by a 5-4 vote impliedly overruled a decision rendered the previous year[14] and held that search and seizure without a warrant could not produce admissible evidence if the arresting officer could have procured a search warrant.[15] This test of reasonableness of search was upheld six months later,[16] and was followed in the principal case.

Before the recent development in the law of search and seizure, the courts considered a person guilty of crime if (1) he committed a forbidden act of which one in a capacity to arrest became aware or reasonably suspicious, and (2) that he left within the scope of reasonable search sufficient evidence to prove violation of law. The guilt or innocence of the accused rested upon the concurrence of these circumstances.

Since the advent of this new Federal rule, these factors which might be proved by the arresting officer might not suffice. If he entered without a search warrant and had time to obtain one, evidence which might be essential to the state's case would be rendered inadmissible. By developing and adhering to the third factor, the courts

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admission in evidence of the instrument of a crime holding valid the seizure of articles such as bloodstained knife or garment, half emptied phial of poison, mask or disguise, counterfeit coins or plates, gambling devices or stolen property.)

[5]State v. Hart, 157 P.2d 72 (Idaho 1945).

[6]Bird v. State, 143 Miss. 493, 122 So. 539 (1929); Tolivar v. State, 133 Miss. 789, 98 So. 342 (1923).

[7]Marron v. U.S., 275 U.S. 192 (1927); Agnello v. U.S., 269 U.S. 20 (1925); Commonwealth v. Vanderpool, 84 Pa. Sup. Ct. 552 (1925), held that evidence procured from search without warrant of whole house on warrant for running a disorderly house was not unreasonable.

[8]White v. State, 159 Miss. 503, 132 So. 599 (1931); Tolivar v. State, *supra* note 6.

[9]Silverstein v. State, 176 Md. 533, 6 A.2d 464 (Md. 1939); Agnello v. U.S. *supra* note 7.

[10]Harris v. U.S., 155 F.2d 628 (C.C.A. 4th 1946); Marron v. U.S., *supra* note 7. criticism from an overwhelming majodity of adverse decisions.

[11]People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943).

[12]U.S. v. Wallace & Tieran Co., 69 Sup. Ct. 824 (1949).

[13]Hart v. U.S., 162 F.2d 74 (C.C.A. 10th 1947).

[14]Harris v. U.S., *supra* note 10.

[15]U.S. v. Trupiano, 334 U.S. 699 (1948).

[16]McDonald v. U.S., 69 Sup. Ct. 191 (1948).

are creating a paradox in that one man's guilt is increasingly more dependent upon another's skill and foresight.

Carl E. Guernsey

Federal Jurisdiction—Diversity of Citizenship—Citizens of the District of Columbia

In an action brought in a Maryland district court, defendant, a corporation of Virginia, moved to dismiss the suit of plaintiff, a corporation of the District of Columbia, on the ground that the court lacked jurisdiction. The district court considered the statute[1] which attempted to confer Federal jurisdiction over civil actions between citizens of the District of Columbia and citizens of states and held it unconstitutional as beyond specification of the provision relating to suits between citizens of different states. The circuit court affirmed. Held: On certiorari the statute was held valid. *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*, 69 Sup. Ct. 1173 (1949).

Early in its history, the Supreme Court of the United States held in *Hepburn and Dundas v. Ellzey*[2] that the District of Columbia is not included in the term "states" appearing in that section of Article III of the Constitution which provides that the judicial power of the United States shall extend to controversies between citizens of different states.[3] Chief Justice Marshall there declared:

> It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not judicial consideration.

However, Congress failed to act and the doors of the Federal district courts stayed closed to citizens of the District of Columbia, the courts uniformly upholding the ruling in the *Hepburn* case.[4]

In 1940 Congress attempted to remedy this situation by amendment of Section 24 (1) (b) of the Judicial Code[5] in an effort to extend the diversity jurisdiction of

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[1] 54 Stat. 143 (1940), 28 U.S.C. § 41 (1) (b) (Supp. 1947).

[2] 2 Cranch 445 (U.S. 1805).

[3] U.S. Const. Art. III, § 2 provides: "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States. . . . to controversies. . . . between citizens of different states. . . ."

[4] O'Donoghue v. United States, 289 U.S. 516 (1933); Hooe v. Jamieson, 166 U.S. 395 (1897); Barney v. Baltimore City, 6 Wall. 280 (U.S. 1867); Duehay v. Acacia Mutual Life Ins. Co., 105 F.2d 768 (App. D.C. 1939); Anderson v. United States Fidelity & Guaranty Co., 8 F.2d 428 (S.D. Fla. 1925); Merrill v. Atwood, 297 Fed. 630 (D.C.R.I. 1924); Mutual Life Ins. Co. v. Lott, 275 Fed. 365 (S.D. Cal. 1921); Pannill v. Roanoke Times Co., 252 Fed. 910 (W.D. Va. 1918); American National Bank v. Tappan, 174 Fed. 431 (C.C.D. Mass. 1909), *aff'd*, 217 U.S. 600 (1910); Corporation of New Orleans v. Winter, 1 Wheat. 91 U.S. (1816).

[5] 54 Stat. 143 (1940), 28 U.S.C. § 41 (1) (b) (Supp. 1947). The statute as amended provides: "The district courts shall have original jurisdiction as follows: (1) . . . . Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . (b) Is between citizens of different states, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory. . . ."

the Federal district courts to include suits between citizens of the District of Columbia and citizens of any state. Prior to the instant case the statute as amended has been held unconstitutional by eight district courts and two circuit courts,[6] as beyond the power granted Congress by the judiciary article.

It had previously been held constitutional by three district courts[7] as a valid exercise of the power extended Congress under Article I to legislate over the District of Columbia.[8] This is the reasoning adopted by Justices Jackson, Black, and Burton in the instant case, hence the *Hepburn* decision is not disturbed. Justices Rutledge and Murphy concurred in the judgment but were of the opinion that to allow Congress power under Article I, which is denied under Article III, is unconstitutional and that the *Hepburn* case should be overruled.

The problem is further confounded by the passage of another amendment in 1948, while the instant case was on the docket, which provides that for purposes of diversity of citizenship and consequent jurisdiction the territories and the District of Columbia are states.[9] Congress apparently intended to exercise its full legislative powers under both Articles I and III. The court in the instant case took no notice of this amendment, but it now appears to be valid. The effect is to overrule in fact, if not in theory, the out-dated and unrealistic doctrine of the *Hepburn* case.

Fred A. Carver

Fixtures—Taxation—Machinery and Equipment of Laundry, Not Affixed to Land, Become Fixtures and Taxable as Part of Real Estate

An ad valorem tax[1] was levied upon the machinery and equipment employed in the operation of a laundry, such machinery and equipment not being physically affixed to the building. The owner of the machinery and equipment was also the owner of the building. After enumerating specific types of real property subject to the tax, none of which included the machinery and equipment, the statute provided for assessment of "all other real estate not exempt by law from taxation." Held: Under so-called "assembled industrial plant doctrine," such machinery and equipment though not affixed to building is assessed as real estate and subject to the tax on real estate.

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[6]National Mutual Ins. Co. v. Tidewater Transfer Co., 165 F.2d 531 (C.C.A. 4th, 1947); Central States Co-ops v. Watson Bros. Transportation Co., 165 F.2d 392 (C.C.A. 7th 1947); Willis v. Dennis, 72 F. Supp. 853 (W.D. Va. 1947); Feely v. Sidney S. Schpper Interstate Hauling System, 72 F. Supp. 663 (D.C. Md. 1947); Wilson v. Guggenheim, 70 F. Supp. 417 (E.D.S.C. 1947); Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D.C. Mass. 1946); Behlert v. James Foundation of New York, 60 F. Supp. 706 (S.D.N.Y. 1945); McGarry v. City of Bethlehem, 45 F. Supp. 385 (E.D. Pa. 1942).

[7]Duze v. Woolley, 72 F. Supp. 422 (D.C. Hawaii 1947); Glaeser v. Acacia Mutual Life Association, 55 F. Supp. 925 (N.D. Cal. 1944); Winkler v. Daniels, 43 F. Supp. 265 (E.D. Va. 1942).

[8]U.S. Const. Art. I, § 8 provides: "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the Government of the United States. . . ."

[9]H.R. 3214 (1948), 28 U.S.C.A. § 1332 (b) (Supp. 1948) after providing jurisdiction in civil suits between citizens of different states now reads: ". . . the word 'states,' as used in this section, includes the territories and the District of Columbia."

[1]Pa. Law 853, Art. II, § 201, as amended by the Act of July 2, 1941, Pa. Law 219, § 1, 72, P.S. § 5020-201.

United Laundries, Inc. v. Board of Property Assessment, 359 Pa. 195, 58 A.2d 833 (1948).

The "assembled industrial plant doctrine" was developed to protect mortgagees of the realty from having the machinery of a manufactory attached and sold by creditors of the mortgagor. It is said that, "Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold."[2] This doctrine has now been extended to cover industries other than manufactories, and its scope extended to include equipment and machinery as real estate to be assessed under a real estate ad valorem tax.[3]

In any state where tangible personal property is not subjected to separate taxation, or only in limited categories, it is important to the taxpayer to have machinery and equipment classified as personalty.[4] This is also true in states where a tax upon personal property is not a lien upon the property as in the case of real property.[5]

Where this type of property is owned by someone other than the owner of the land, the problem is presented as to whether or not a lien extends to cover both, rendering the machinery subject to a tax sale as part of the real estate.[6] Because a tax is a charge against the property,[7] it would seem that a sale of the title to the res includes all property assessed.[8] The tenant who has title to the machinery and equipment included in the assessment of the plant either becomes burdened with the payment of the tax upon the entire property or incurs the risk of a tax sale in case the landlord defaults.

In those states, such as Mississippi, where personal and real property are subjected to separate ad valorem taxes which can be collected by a sale of the property, it is important to determine whether the machinery and equipment are personalty assessable to the tenant or improvements to the real estate assessable to the lessor.[9] In Mississippi the guiding considerations are announced in *Weathersby v. Sleeper:*[10]

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[2]Voorhis v. Freeman, 2 W. & S. 116 (Pa. 1841).

[3]United Laundries, Inc. v. Board of Property Assessment, 359 Pa. 195, 58 A.2d 833 (1948).

[4]G. L. (Ter. Ed.) Mass., c. 59 § 5, subd. 16, as amended by Stat. 1936, c. 362, § 1, subd. 16.

[5]*See* Hamilton Mfg. Co. v. Lowell, 185 Mass. 114, 69 N.E. 1080, 1081 (1904).

[6]*See* Bibbins v. Clark, 90 Iowa 230, 57 N.W. 884, 885 (1894). The court said, "Taxes become liens by virtue of statute only, and, when created, the lien is not to be enlarged by judicial construction."

[7]Miss. Code § 9746 (1942) (in some states, such as Mississippi, the taxpayer is also personally liable).

[8]Miss. Code § 9744 (1942), which reads in part: "And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold. . . ."

[9]Miss. Code § 9744 (1942). In Mississippi, both personal and real property are subjected to an ad valorem tax and all taxes assessed are a lien upon and bind the property assessed.

[10]42 Miss. 732 (1869) (involving a lien on property arising from money advanced to erect a steam mill); *accord,* American Laundry Machinery Co. v. Citizens' Nat. Life Ins. Co., 107 Miss. 108, 65 So. 113 (1914) (real estate mortgagee had no claim to laundry machinery attached by screws as against a subsequent chattel mortgagee).

> Whether an article is personal property or a fixture, must be determined by taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and other attending circumstances indicating the intention to make it a temporary attachment or a permanent accession to the realty.

These and similar situations[11] illustrate important considerations and consequences in the classifying of machinery and equipment as real estate or personalty for purposes of taxation.

Taylor Webb

Sales—Conversion by Purchaser from Conditional Vendee

Plaintiff sold automobile to conditional vendee, retaining title until the purchase price was paid. Vendee sold the car to defendant, an innocent purchaser for value, who, after learning of the conditional sales agreement, resold it. Held: Act of defendant in reselling car after notice of conditional vendee's lack of title amounted to conversion. *Schwartz v. Fulmer,* 217 S.W.2d 254 (Ark. 1949).

The question of the validity of conditional sales as against innocent third persons has been vigorously debated from the time the question was presented to the courts in the first half of the nineteenth century. On behalf of the bona fide purchaser, it was urged that the seller was estopped to set up his title as against persons who had advanced money on the faith of the conditional buyer's appearance of ownership.[1]

The proponents of the opposite view emphasize the principle of *caveat emptor,* and urge that conditional sales should be fostered in the interest of trade and commerce.[2]

Today, the great majority of courts allow the conditional seller to repossess goods from purchasers in good faith from the conditional buyer.[3] Hostility to the conditional sale and consequent declaration of its invalidity against bona fide subvendees has appeared, however, in Pennsylvania,[4] Colorado,[5] Illinois,[6] and Maryland.[7] Kentucky treats the conditional sale the same as a chattel mortgage and holds it to be invalid unless recorded subject to the rules of mortgages.[8]

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[11]Cal. Const. Art. XIII, § 16; Rev. Stat. § 5219 (1878) as amended 44 Stat. 223 (1926), 12 U.S.C. § 548 (1934). In California, only real property of banks is subjected to property taxation.

[1]Sumner v. Woods, 52 Ala. 94 (1875).

[2]Woods v. Nichols, 21 R.I. 537, 45 Atl. 537 (1900).

[3]American Hoist and Derrick Co. v. Lynn, 167 Miss. 93, 148 So. 351 (1933); McIntosh v. Hill, 47 Ark. 363, 1 S.W. 680 (1886).

[4]Until changed by statute in 1925, Pennsylvania believed the conditional sale to be fraudulent and treated it with great disfavor. The bona fide purchaser from the conditional buyer was therefore preferred over the conditional seller. Miller Pasteurizing Mach. Co. v. Conway, 214 Fed. 485 (D.D. Pa. 1914).

[5]George v. Tuffs, 5 Col. 162 (1879); Gerow v. Castello, 11 Col. 560, 19 P. 505 (1888); Weber v. Diebol Safe and Lock Co., 2 Col. App. 68, 29 Pac. 747 (1892) where the court held: "A party, who, by his own acts, places another in the ostensible position of owner, should be estopped to deny such ownership. Private transactions such as this are not favored."

[6]Jennings v. Gage, 12 Ill. 610 (1852); Brundage v. Camp, 21 Ill. 330 (1859).

[7]Lincoln v. Quynn, 68 Md. 299 (1887). By statutory enactment, Maryland now holds conditional sales valid if recorded.

[8]Mentenergrop-Riehn Music Co. v. Beuris, 160 Ky. 557, 169 S.W. 986 (1914); U.S. Cast Iron Pipe Co. v. Henry Vogt Machine Co., 182 Ky. 473, 206 S.W. 806

The framers of the Uniform Conditional Sales Act evidently regarded a conditional sales agreement in much the same light as does the Kentucky courts. It provides that a conditional sale contract must be recorded in order to be valid as against bona fide purchasers for value and without actual notice.[9]

The main objections to conditional sales have always been focused upon their secret nature and the difficulty of uncovering hidden agreements. Hence statutes requiring their recordation have been adopted by thirty-three states. The conditional sale then becomes a matter of public notice and loses its undesirable characteristic of secretiveness. To prevent injury to innocent persons who must rely on the buyer's apparent ownership, it seems desirable to require registration. The burden on the vendor is slight and the benefit to the public is great.

In those states not requiring recordation of conditional sales contracts, including Arkansas and Mississippi, the innocent purchaser for value and without notice should be protected. This can be assured only by adequate registration requirements.

James R. Billingsley

Taxation—Duty of Tax Assessor to Separately Assess Separately Owned Mineral Interests

The tax assessor refused to separately assess certain mineral interests owned by the plaintiff. Upon plaintiff's application, the sheriff separately assessed them and collected the taxes due. The land was sold subsequently at a tax sale, and defendant claimed title to both surface and mineral rights under the tax sale. Held: Title to minerals did not pass under the tax sale. *McNatt v. Hyman,* 36 So.2d 161 (Miss. 1948), *suggestion of error sustained,* 38 So.2d 107 (Miss. 1949).

Section 9770 of the Mississippi Code of 1942,[1] directs the county tax assessor to separately assess mineral interests owned apart from and independently of surface interests. While prior Mississippi cases[2] have recognized the validity of this section,

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(1918). As stated by Bogert in his Commentaries on Conditional Sales: "Had the final position of the Kentucky court been adopted generally, a tremendous amount of legislation and litigation would have been avoided. By declaring the conditional sale nothing but a chattel mortgage in disguise and applying to it the body of rules already built up for chattel mortgages, much inconveniences and expense would have been avoided the result would ultimately have been the same as that achieved by declaring the conditional sale a distinct institution and then proceeding to define and limit it. If there be any truth in the suggestion sometimes made that the conditional sale was framed as an evasion of the chattel mortgage laws regarding recording and protection of the buyer's equity, there was an additional reason for declaring conditional sales to be chattel mortgages.

[9]Uniform Conditional Sales Act § 5.

[1]Miss. Code § 9770 (1942). This section provides *inter alia:* "Whenever any buildings, improvements or structures, mineral, gas, oil, timber or similar interests in real estate, including building permits or reservations, are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, or when any person reserves any right or interest, or has any leasehold in the elements above enumerated, all of such interests shall be assessed and taxed separately from such surface rights and interests in said real estate, and shall be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes."

[2]Gulf Refining Co. v. Stone, 197 Miss. 713, 21 So.2d 19 (1945); Stern v. Parker, 200 Miss. 27, 25 So.2d 787 (1946).

it has never been fully interpreted by the Mississippi Supreme Court; and consequently some uncertainty has prevailed as to its extent and applicability.

In the present case the fundamental question for decision was whether this section is mandatory on the tax assessor. The court answered this question in the affirmative, but with certain qualifications necessitated by their decision in *Stern v. Parker*.[3]

The owner of the mineral rights in the *Stern* case did not request a separate assessment before the tax sale, nor did he pay the taxes due on his property interest. The court held that the assessor was under no duty to search the deed records in order to determine the true owners of all the interests in lands, but that the law imposed upon the owners of separate interests a duty to see that their subsurface estates were assessed and taxed correctly. The extent of the taxpayer's duty was not specifically defined in the *Stern* case.

In its first opinion in this suit,[4] the court held that the taxpayer's duty was not satisfied until he had exhausted all legal remedies, including a compulsory judicial process to effect a separate assessment. Upon the final hearing a majority concluded that this imposed too harsh a burden on the taxpayer. The owner's duty is thus satisfied by an appearance before the assessor and by a request for a separate assessment. The requirements of Section 9770[5] then become mandatory upon the assessor, not merely directory. A breach of the assessor's duty to assess separately when requested to do so would seem to render a subsequent tax sale void insofar as that separately owned interest is concerned.[6]

The sheriff is authorized by statute to assess and collect taxes on all lands left unassessed by the assessor.[7] The court held the present assessment came within

The decision in this case is in accord with that reached in other jurisdictions.[8]

The primary importance of *McNatt v. Hyman* is as to sales prior to 1948. At that time the state adopted a mineral documentary stamp tax.[9] All non-producing oil, gas, and other mineral interests executed after its effective date are subjected to this tax at the time the deed or other instrument is recorded. After that they are exempt from all ad valorem taxes, and "any sale for taxes of the surface or of the

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[3]*Supra* note 2.
[4]McNatt v. Hyman, 36 So.2d 161 (Miss. 1949).
[5]*Supra* note 1.
[6]City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489 (1898), which holds that an entire separable assessment is not bad where a portion of the tax levied is legal and the remainder illegal.
[7]Miss. Code § 9901 (1942), which provides *inter alia:* "The collector shall assess and collect taxes on land liable to taxation left unassessed by the assessor. . . ." these terms.
[8]Washburn v. Greggory Co., 147 N.W. 706 (Minn. 1913), a case involving a factual situation almost identical with that presented here and involving the interpretation of a statute very similar to Section 9770 of the Mississippi Code of 1942. The Minnesota Supreme Court used the following pertinent language: "Before the statute, it was not only proper to tax the mineral interest separately, but it was plainly an irregularity to assess to one owner as one property both the surface and mineral rights, when they were owned separately. . . . But it was the duty of the taxing officers, under the statute, as well as under the common law, to assess and tax separately the interests of the plaintiff and those of the owner of the surface."
[9]Miss. Code §§ 9701-01 through 9701-11 (1942).

remainder of the fee shall not in any manner whatsoever affect the interest or interests hereby exempted."[10]

James E. Price

Torts—Recovery for Pre-natal Injuries

Plaintiff, an infant, brought suit to recover for pre-natal injuries sustained through negligence of defendant. Held: Plaintiff, as an existing viable child in its mother's womb, is a person and has a cause of action after birth for injuries resulting from negligence of another. *Williams v. Marion Rapids Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949).

The above case brings into focus the controversy now going on in the courts of this country with regard to the problem of recovery by infants for pre-natal injuries. The *Williams* case represents the modern, though minority, trend of American judicial thinking on this problem.[1]

The majority of American courts deny recovery,[2] citing four reasons.[3] First, it is argued that the child is not a person and hence has no legal existence.[4] Second, in cases involving common carriers, courts have ruled that the infant *en ventre sa mere* is not a party to the contract.[5] Third, some courts are influenced by the practical inconvenience of proof and the possibility of injustice.[6] Fourth, to add weight to their previous reasons, courts state that the pre-natal suits would stir up litigation and therefore be against public policy.[7]

Each of the above reasons seems susceptible to satisfactory refutations. However, the first reason assigned, which was specifically repudiated in the *Williams* case, seems the only one worthy of comment.

Several courts have recognized the fact that a viable child, though carried in its mother's womb, is not a part of its mother but is then and there capable of extra-uterine life.[8] On this basis, at least one other court has ruled that the child is a person and allowed recovery.[9] If not a part of its mother, it should logically be considered a person, whose ability to legally protect his rights arises upon birth.

The injustices resulting from decisions denying the infant a right of recovery are obvious. Though there are very few cases on this point, it appears that the

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[10]Miss. Code § 9701-02 (1942).

[1]Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. D.C. 1946).

[2]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Stanford v. St. Louis & S. F. Ry., 214 Ala. 611, 108 So. 566 (1926); Berlin v. J. C. Penny Co., 339 Pa. 547, 16 A.2d 28 (1940); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[3]32 Corn. L. Q. 609 (1947).

[4]Dietrich v. Northampton, 138 Mass. 14 (1884); Lipps v. Milwaukee Electric R. & L. Co., 164 Wis. 272, 159 N.W. 916 (1916); Allaire v. St. Luke's Hospital, *supra* note 2; Drobner v. Peters, *supra* note 2.

[5]Walker v. Great Northern Ry., L.R. 28 Ir. 69 (1891); Nugent v. Brooklyn Heights Ry., 154 App. Div. 667, 139 N.Y. Supp. 367 (2d Dep't. 1913).

[6]Drobner v. Peters, *supra* note 2.

[7]Walker v. Great Northern Ry., *supra* note 5.

[8]Lipps v. Milwaukee Electric R. & L. Co., *supra* note 4; Bonbrest v. Kotz, *supra* note 1.

[9]Bonbrest v. Kotz, *supra* note 1.

courts of only one state, Alabama, have ruled that the mother may recover for damages to the unborn child.[10] Alabama courts base this decision on the child being a part of the mother.[11] Clearly, this solution leaves much to be desired for the child is poorly compensated, at best, for the injuries which appear at birth.

The Supreme Court of Mississippi has not yet been called upon to consider the right of a child to bring an action for injuries sustained while in the womb of its mother. Although the action was not known at common law,[12] its absence alone should not be sufficient grounds for denial of such an action. The court has the power to determine what the common law is,[13] and it expands and develops to meet changing conditions and to serve the interests of the people.[14] Certainly as a matter of fairness, the court should grant an infant the right to recover for a loss suffered from pre-natal injuries.

McRae Turner, Jr.

Trade-Marks and Trade-Names—Geographical Name Acquiring Secondary Meaning Entitled to Protection Against Unfair Competition

Plaintiffs had, for six years, been engaged in business as the "Atlanta Rug Cleaning and Dyeing Company," and had done extensive advertising under this name. Defendants opened a business under the name "Atlanta, Georgia Rug Company." Plaintiffs ask for an injunction, accounting, and other equitable relief, alleging that the trade-name of defendants was used with the purpose of engaging in unfair competition with the plaintiffs, by deceiving the public into thinking that the businesses of the plaintiffs and the defendants were the same. Held: Although a geographical name may acquire a secondary meaning indicative of a product so that the name as employed may be the subject of protection against unfair competition in trade, the petition of plaintiffs did not allege such secondary meaning entitled to protection of the courts. Plaintiff's allegation concerning length of time during which they had used and advertised their trade-name was insufficient to raise the inference of that name having acquired a secondary meaning. *Gano et al. v. Gano et al.*, 47 S.E.2d 741 (Ga. 1948).

As was concisely stated by one court, the doctrine of unfair competition amounts to no more than this: one person has no right to sell goods as the goods of another, nor to do other business as the business of another, and on proper showing will be restrained from so doing.[1] While the office of a trade-mark is to indicate the personal origin or ownership of an article, yet a merely geographical name cannot be exclu-

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[10]Birmingham Baptist Hospital v. Branton, 218 Ala. 464, 118 So. 741 (1928); Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933); *see* Stanford v. St. Louis & S. F. Ry., *supra* note 2; Allaire v. St. Luke's Hospital, *supra* note 2; Dietrich v. Northampton, *supra* note 4.

[11]Birmingham Baptist Hospital v. Branton, *supra* note 10; Snow v. Allen, *supra* note 10.

[12]See note 2 *supra.*

[13]City of Jackson v. McFadden, 181 Miss. 1, 177 So. 755 (1937).

[14]Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937); Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 756 (1929); New Orleans & N. E. Ry. v. Watson, 157 Miss. 243, 128 So. 105 (1930).

[1]Dyment v. Lewis, 144 Iowa 509, 123 N.W. 244 (1909).

sively appropriated and so used.[2] Here there is a broader public right.[3] Such exclusive appropriation would prevent others from properly describing their product and hence a monopoly would result.

Thus, the rule was at first established that anyone might properly use for his own product any descriptive words such as geographical phrases, but that, since such words are of common or public right, no one was entitled to their exclusive use to designate his business or its products.[4] It soon became apparent that this rule, literally applied in all cases, would encourage commercial frauds; hence developed the "secondary meaning" doctrine.[5] Hence a geographical, or otherwise descriptive, word or phrase may nevertheless have been used so long and so exclusively by one trader or producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean the product. This is its secondary meaning.[6]

A use by another in this secondary sense will be restrained as unfair and fraudulent competition.[7] The manufacturer is entitled to the reputation he has acquired, and the public is entitled to the means of distinguishing between his goods and those of another; and protection is afforded whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.[8] The use of even one's own name in business is subject to the general rules relating to unfair competition. Such use must be in good faith, without confusion of goods or unfair competition with or capitalization on a name already established in business or the good will thereof.[9]

The elements to be considered in determining whether a name has acquired a secondary meaning are: (a) length of use of such name, (b) the nature and extent of popularizing and advertising it, and (c) the efforts in promoting the consciousness of the public in connecting that name with a particular business.[10] Allegation and

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[2]Columbia Mill Co. v. Alcorn, 150 U.S. 460 (1893); Delaware & H. Canal Co. v. Clark, 13 Wall. 311 (U.S. 1871); American Watch Import Co. v. Western Clock Co., 16 F.2d 347 (App. D.C. 1926); Cleveland Opera Co. v. Cleveland Civic Opera Ass'n., 22 Ohio App. 400, 154 N.E. 352 (1926); Glendon Iron Co. v. Uhler, 75 Pa. 467 (1874); AMDUR, TRADE-MARK LAW AND PRACTICE 169-175 (Lanham Act ed. 1948).

[3]Merriam Co. v. Saalfield, 198 F. 369 (C.C.A.6th 1912).

[4]Elgin National Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901); Columbia Mill Co. v. Alcorn, *supra* note 2; Delaware & H. Canal Co. v. Clark, *supra* note 2.

[5]Merriam Co. v. Saalfield, *supra* note 3.

[6]Merriam Co. v. Saalfield, *supra* notes 3 & 5; Quaker State Oil Refining Co. v. Steinberg, 325 Pa. 273, 189 A. 473 (1937); Montgomery v. Thompson, A.C. 217 (1891); Wotherspoon v. Currie, L.R. 5 E. & I. App. 508 (1872).

[7]French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903); Elgin National Watch Co. v. Illinois Watch Case Co., *supra* note 4; Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., 95 F.2d 711 (C.C.A.10th 1938); Western Auto Supply Co. v. Knox, 93 F. F.2d 850 (C.C.A.10th 1937); Phillips v. The Governor & Company of Adventurers of England Trading Into Hudson's Bay, 79 F.2d 971 (C.C.A.9th 1935); American Home Benefit Ass'n. v. United American Benefit Ass'n, 63 Idaho 754, 125 P.2d 1010 (1942); American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N.E. 141 (1899); Montgomery v. Thompson, *supra* note 6; Wotherspoon v. Currie, *supra* note 6.

[8]Elgin National Watch Co. v. Illinois Watch Case Co., *supra* notes 4 & 7; Phillips v. The Governor & Company of Adventurers of England Trading Into Hudson's Bay, *supra* note 7.

[9]Cockrell v. Davis, 198 Miss. 660, 23 So.2d 256 (1945).

[10]Sun Valley Mfg. Co. v. Sun Valley Togs, Inc., 39 F. Supp. 502 (S.D.N.Y. 1941).

proof of these factors must be made or the secondary name will not be protected against simulation.[11]

In the instant case, the court has well stated the present-day rule of substantive law. As a matter of procedure it insists that a complainant seeking equitable protection of his use of a geographical trade-name must allege and prove that it has acquired a secondary significance so as to particularly identify, in the mind of the public, the complainant, his business, or his product.

Robert A. Walker

Wills—Conflict of Laws—Revocation in a Foreign Jurisdiction

Testatrix, domiciled in Illinois, died leaving real property in Illinois and Iowa. A properly executed will was denied probate in Illinois because it had the word "void" written over its face several times with the signature of the testatrix affixed thereto.[1] Proponents of the instrument then presented it for probate in Iowa. An Iowa statute provides that a will executed according to the laws of the state where made shall be valid in Iowa.[2] The trial court denied probate on grounds of res adjudicata. Held: Revocation governed by law of the state where land is located, and since Iowa statute does not provide for revocation by cancellation,[3] the will was valid as to Iowa property. In re *Barrie's Estate,* 35 N.W.2d 658 (Iowa 1949).

At common law, the *lex loci rei sitae* governs the validity of wills devising land,[4] but a statute may alter the general rule and provide that such a will may be valid if executed according to the laws of the place where executed.[5] Such a statute was passed by the Iowa Legislature apparently with the intention that this law would minimize the confusion existing under the common-law rule.[6] But because it failed to include revocation expressly, the court said that an issue of revocation must be interpreted according to the common-law rule. Yet Iowa has another statute which

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[11] Sun Valley Mfg. Co. v. Sun Valley Togs, Inc., *supra* note 10; Surf Club v. Tatem Surf Club, Inc., 151 Fla. 406, 10 So.2d 554 (1942); Addison v. Hook, 91 Fla. 337, 107 So. 623 (1926); National Brands Food Stores, Inc. v. National Brands Stores, 183 Ga. 88, 187 S.E. 84 (1936).

[1] *In re* Barrie's Will, 393 Ill. 111, 65 N.E.2d 433 (1949); Ill. Rev. Stat., c. 3, par. 197 (1945) provides for revocation by burning, cancelling, tearing, or obliterating.

[2] Iowa Code § 633.49 (1946): "A last will and testament executed without this state, in the mode prescribed by law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and is subscribed by the testator."

[3] Iowa Code § 633.10 (1946) provides for revocation by burning, tearing, or obliterating. Note that "cancelling" is omitted. Mississippi provides for revocation by destroying, cancelling, or obliterating or by subsequent will, codicil, or declaration. Miss. Code § 658 (1942).

[4] Story, Conflict of Laws 652 (8th ed. 1898); 2 Page on Wills §§ 1427, 2397 (2d ed. 1926); Robertson v. Pickrell, 109 U.S. 608 (1883); Darby v. Mayer, 10 Wheat. 464 (U.S. 1825).

Mississippi follows the common-law rule. Belt v. Adams, 125 Miss. 387, 87 So. 666 (1921); Hailey v. McLaurin's Estate, 112 Miss. 705, 73 So. 727 (1917); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Wynne v. Wynne, 23 Miss. 251 (1852); Ball v. Phelan, 94 Miss. 293, 49 So. 956 (1908).

[5] 2 Page on Wills § 2397 (2d ed. 1926); *post* note 11.

[6] *Supra* note 4.

provides for a liberal interpretation of all statutes in derogation of the common law.[7]

Revocation is merely the converse of execution. The power to execute implies the power to revoke. A will cannot be said to be "executed" after it has been "revoked."[8] Whether or not an instrument is a valid will is to be determined not only by the manner of its execution but also by the manner of its attempted revocation. Both acts are a part of the testamentary process. It is hardly plausible that the Iowa Legislature intended to include one and not the other. The common law courts, unrestrained by the Statute of Wills which failed to provide for revocation, proceeded to build up a set of rules concerning it.[9] Many states have similar statutes,[10] or acts which have been interpreted to mean the same,[11] but only Wisconsin has heretofore had occasion to deal specifically with revocation under a similar statute.[12] In this case the court said that whether there has been a revocation or not necessarily involves an inquiry into the foreign probate proceeding.

Since foreign ownership of realty is common today, it would seem unreasonable to expect such people to know the laws concerning execution and revocation of wills of all the states in which they own land, in addition to that of the state in which they live. As said by one author, "If a testator has any knowledge of the formalities of executing a will, his knowledge is generally confined to the law of his domicile or the law of the place where he makes his will, if he relies on local advice."[13]

It seems very probable that additional states will enact similar statutes in an effort to eliminate part of the confusion surrounding the probate of foreign wills. In view of the social and economic interrelationships in this country and the purposes of this type of statute, the courts should avoid specious reasoning which tends to defeat the aims of the legislatures. There is nothing sacrosanct about *lex loci* anymore than about any other common-law rule. Therefore, why should it be perpet-

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[7]Iowa Code § 4.2 (1946): "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist parties in obtaining justice."

[8]1 Page on Wills § 59 (2d ed. 1926).

[9]1 Page on Wills § 400 (2d ed. 1926).

[10]Arkansas, Kirby's Digest of the Stats. § 8049 (1904); Connecticut, Gen. Stat. § 293 (1902), Murdoch v. Murdoch, 81 Conn. 681, 72 Atl. 290 (1909); Iowa, Ann. Code § 3309 (1897), Iowa Code § 633.49 (1946); Illinois, Hurd's Rev. Stat., c. 148, § 9 (1908), Amrine v. Hamer, 240 Ill. 572, 88 N.E. 1036 (1909); Louisiana, Merrick's Rev. Civil Code Art. 1596 (1900), Succession of Drysdale, 124 La. 256, 50 So. 30 (1908); Maine, Rev. Stat., c. 66, § 13 (1903), Lyon v. Ogden, 85 Me. 374, 27 Atl. 258 (1893); Maryland, Md. Code Pub. and Gen. Laws Art. 93, § 327 (1904), Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566 (1906); Massachusetts, Mass. Rev. Laws, c. 135, § 5 (1902); Minnesota, Minn. Rev. Laws § 3662 (1905), Babcock v. Collins, 60 Minn. 73, 61 N.W. 1020 (1895); Montana, Mont. Code of Civil Procedure §§ 1731, 2352 (1904), Rev. Codes § 4734 (1907), State v. District Court, 34 Mont. 96, 85 P. 866 (1906); New Hampshire, N.H. Pub. Stat., c. 186, § 5 (1901); New Mexico, Comp. Laws § 1976 (1897); North Dakota, Rev. Code § 5097 (1905), Oklahoma, Comp. Laws § 8901 (1909), Wattenbarger v. Wattenbarger, 39 Okla. 531, 135 P. 1141 (1913); Rhode Island, Gen. Laws, c. 254, § 36 (1909); South Dakota, Rev. Code § 1010 (1903); Utah, Compiled Statutes § 2744 (1907); Vermont, Pub. Stat. § 2750 (1906); Wisconsin, Wis. Stat. §§ 2295, 3789, 3790 (1917), *In re* Gailey's Will, 169 Wis. 444, 171 N.W. 945 (1919).

[11]Houser v. Paducah Lands Co., 157 Ky. 252, 162 S.W. 1113 (1914).

[12]*In re* Gailey's Will, *supra* note 10.

[13]2 Page on Wills § 1429 (2d ed. 1926).

uated in the face of a statute which the legislature clearly expected to abrogate the common-law rule as to foreign wills?[14]

Roy C. Kuyrkendall, Jr.

Wills—Not Mutual in Absence of Direct Reference or Language from which Contract Can Be Inferred

Pursuant to an oral agreement, husband and wife executed wills at same time providing for each other's relatives. After husband's death, the widow executed another will changing her devisees. Following her death, executor of her first will sought to have her second will declared null and void. Held: The first wills were not mutual since there was no direct reference to husband's will nor any language from which a contract could be inferred. *National Bank of Austin et al. v. Emerson et al.*, 335 Ill. App. 494, 82 N.E.2d 382 (1948).

There is a notable absence of discrimination in the judicial use of the terms "joint," "mutual," "double," "companion," and "reciprocal" as applied to wills. Since it is impossible to ascertain the meaning of the decision in a particular case without looking to the real nature of the will and its provisions, for the purposes of this discussion mutual wills are considered as the separate instruments of two persons which are reciprocal in their provisions.[1]

Wills which are both joint and mutual are generally held to contain within themselves sufficient contractual intent in the absence of definite evidence to the contrary.[2]

During the lifetime of both parties to mutual wills, whether or not executed in pursuance of a contract, either party may revoke it insofar as it purports to dispose of his property if the other party is given notice of the intention to revoke.[3] And even after one of the parties to mutual wills has died and the survivor has accepted the benefits from the will of the deceased, it is generally held that the survivor may yet withdraw and execute a separate individual will different in provisions from the mutual and reciprocal wills, provided that the prior mutual wills were made primarily out of the affection of one testator for the other.[4]

As was said in the instant case, a contract for reciprocal wills need not be express; it may arise by implication from circumstances which make it clear that the parties had such wills in mind, that they intended to carry out their plans for

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[14]For more on this proposition, see: Note, *The Validity of Wills, Deeds and Contracts as Regards Form in Conflict of Laws*, 20 Yale L.J. 427 (1911); Note, *Inheritance Problems in the Conflict of Laws*, 24 Mich. L. Rev. 558 (1926); Note, *Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases*, 25 Ill. L. Rev. 778 (1931); Note, *Conflict of Laws as to Construction of Wills*, 42 Mich. 1135 (1944).

[1]Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909); Frese v. Mayer, 392 Ill. 59, 63 N.E.2d 768 (1945).

[2]Frazier v. Patterson, *supra* note 1; Rastetter v. Hoeninger, 214 N.Y. 66, 108 N.E.2d 768 (1915); Campbell v. Dunkelberger, 172 Iowa 385, 153 N.W. 56 (1915); Bower v. Daniel, 198 Mo. 289, 95 S.W. 347 (1906).

[3]Frazier v. Patterson, *supra* note 1; *see* Campbell v. Dunkelberger, *supra* note 2.

[4]Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905); Cawley's Estate, 136 Pa. 628, 20 Atl. 567 (1890); Edson v. Parsons, 155 N.Y. 555, 50 N.E. 265 (1898). *Contra:* Frazier v. Patterson, *supra* note 1; Campbell v. Dunkelberger, *supra* note 2; Doyle v. Fischer, 183 Wisc. 599, 198 N.W. 763 (1924). *See* Alexander on Wills 96-105 (1917); Stephens v. Myers, 91 Or. 114, 117 P. 37 (1918).

testamentary dispositions in this manner, and that the one party acquiesced in the understanding of the other.[5] However, a mere understanding that wills containing reciprocal bequests are to be executed does not, in itself, constitute a contract.[6]

What, then, constitutes sufficient language or facts from which a contract can be implied so as to prevent an after-death revocation by the survivor of the mutual wills?

An answer to this question necessitates an adoption of principles applicable either to contracts or to wills. From this it follows that the theory which a court adopts as to the nature of the contractual obligation dictates the type of evidence required to establish it. A South Carolina case,[7] in which testimony conclusively established an almost common life, mutual affection for each other, common purposes, conferences, and finally the agreement as to the wisdom of making such wills and the terms in which they should be made, held that such was far from importing that the testatrices acted for each other as a result of contract. Here it was said to be evidence of a union of life and purpose, and not of negotiation.

Illustrative of the application of contract theory in a mutual will case with facts similar to the instant case is *Smith v. Thompson.*[8] Certain designated relatives were reciprocally provided for in the mutual wills and the surviving wife's second will was held void after acceptance of benefits provided in deceased husband's will. This case, relied rather heavily on cases involving third-party beneficiary contracts.[9] A recent West Virginia decision,[10] in reaching the conclusion that a binding agreement existed, stressed the facts that the wills were written and signed at the same time and attested by the same witnesses; that both makers knew the provisions of the other's will; that the texts of the wills were the same; and that instructions and conversations of the parties at the time they discussed drafting of their wills with their attorney were indicative of a prior understanding and agreement.

In Mississippi, the court has not yet had occasion to commit itself. However, the recent case of *Johnson v. Tomme*[11] indicates that the theory applicable to contracts rather than strict will principles may be applied in case of mutual wills having no direct reference to a contract.

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[5]Knox v. Perkins, 86 N.H. 66, 163 Atl. 497 (1932).

[6]Wilson v. Gordon, *supra* note 4; Elmer v. Elmer, 271 Mich. 517, 260 N.W. 757 (1935); Boyle v. Dudley, 87 N.H. 282, 179 Atl. 11 (1935); Tooker v. Vreeland, 92 N.J.Eq. 340, 112 Atl. 665 (1921).

[7]Wilson v. Gordon, *supra* note 4.

[8]250 Mich. 302, 230 N.W. 156 (1930); Doyle v. Fischer, *supra* note 4.

[9]Basset v. American Publication Society, 215 Mich. 126, 183 N.W. 747 (1921); Preston v. Preston, 205 Mich. 646, 172 N.W. 371 (1919); Lugauer v. Husted, 228 Mich. 76, 199 N.W. 682 (1924); Jones v. Ireland, 225 Mich. 467, 196 N.W. 369 (1923); Clark Memorial Masonic Ass'n. v. Colman's Estate, 222 Mich. 599, 193 N.W. 219 (1923).

[10]*In re* Reed, 125 W. Va. 555, 26 S.E.2d 222 (1943); Turner v. Theiss, 38 S.E.2d 369 (W. Va. 1946).

[11]199 Miss. 337, 24 So.2d 730 (1945). This case involved a contract to make a will, after execution of which the testator had done that which "he had agreed to do and all that he could or need. . . . The will, when written in conformity and compliance with the agreement, was a consideration which belonged to the appellee. The testator had no right to revoke it, and its attempted revocation . . . constituted a fraud. . . ." Justice Roberds, dissenting, forewarned that the rule of the majority "like Banquo's Ghost, is going to return often to sorely plague us."

It appears that where the principles pertaining to wills are strictly followed, it is more difficult to present satisfactory and acceptable evidence that mutual wills were made upon a contract basis. Since courts look into every part of a will, every clause and every word, to ascertain the intentions of the testator, it follows, therefore, that interpretation of the instrument according to the doctrine applicable to contracts makes for more certainty that the intentions of the deceased layman will not be defeated by a subsequent revocation of the companion will after a receipt of the benefits of its counterpart.

Frederick Perry Hamel

RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publisher's literature, and the ordinary library sources. The information given in the reviews is derived from a personal reading of the book by the individual whose name appears at the bottom of the review.

BRIEF REVIEWS

MINERAL RIGHTS IN LOUISIANA. By Harriet Spiller Daggett. Revised Edition. Baton Rouge: Louisiana State University Press, 1949, pp. xxi, 616.

Mrs. Daggett, who is a member of the Louisiana State University law faculty, has devoted many years to the study of the intertwining physical and legal aspects of man's quest for oil and gas. Hence the reader may feel assured that the author of the treatise, which is the subject of this review, is an authority in every sense of the word on the subject which she covers.

The present revision is rendered justifiable by both the significant changes in conservation enactments and the numerous Louisiana decisions which have appeared during the ten years since the first edition was prepared. On the publication of that first edition, another reviewer criticized the treatise on the following grounds: (1) that the omission of a treatment of the conservation laws seriously limited its usefulness; (2) that greater emphasis should have been given the rule that the lease contract is construed against the lessee; (3) that the treatment of the mineral lease was not full enough; (4) that the author had failed to give inexperienced lawyers warning of certain legal pitfalls to be avoided; (5) that too little attention was given to a critical analysis of the unitization lease; (6) that more attention should have been given to the abortive attempt to enact a mineral code in Louisiana; and (7) that the author had failed to cite all of the Louisiana materials on the subject.[1]

Were the present review written primarily for Louisiana lawyers, an examination into the validity of the foregoing criticisms of the first edition together with an analysis as to whether the revised work is subject to similar or other objections, would be in order. However, it is considered more appropriate to discuss in this review the possible value to the bench and bar of Mississippi, of Mrs. Daggett's latest edition.

Lawyers from the other 47 states are often prone to throw up their hands when a Louisiana case is cited and dismiss it with some such statement as: "That case is no good, its a Louisiana case." However, it is doubtful that there are many more differences in practical results reached in similar fact situations when Louisiana and Mississippi decisions are compared than when Mississippi and say Oklahoma decisions are collated. This observation is largely true as concerns oil and gas law except for the differences regarding loss of mineral rights by nonuser. Nevertheless, the Mississippi lawyer will find most of Mrs. Daggett's work to be rather difficult to read. One of the principal obstacles is the civil-law terminology. While the author quotes codal definitions of many of the terms and explains others, it is feared that a person having no background of Louisiana property law and who is otherwise

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[1]Nabors, Book Review, 14 TULANE L. REV. 146 (1939).

unfamiliar with the Louisiana codes, would easily find himself lost in the maze of such terms as potestative conditions, lesion, immovables by destination, usufruct, petitory and possessory actions, licitation, the various classifications of servitudes, etc. Furthermore, the "common" lawyer would feel rather uneasy at the references to the Roman and French background of Louisiana law.

From the standpoint of use to the Mississippi practitioner, the chapter on conservation, appearing for the first time in the revised edition, is the most valuable part of the book. Since the basis for conservation law consists of statutes of comparatively modern origin, civilian terminology affords no stumbling block to the reading of this portion of the treatise. Indeed, the present Louisiana and Mississippi conservation statutes contain many identical passages[2] inasmuch as the authors of the legislation in both states borrowed heavily from a "model" act drafted by the Legal Committee of the Interstate Oil Compact Commission. However, as a practical matter it is doubtful that it would be worth the price of the book for a Mississippi practitioner to purchase it merely for the less than ninety pages of discussion of the problems of conservation. The chapter on conservation is by no means exhaustive of the phases covered therein; nevertheless, in comparison with other treatises of similar length, it is one of the best surveys of the subject matter available. Beginners in the study of oil and gas law will find this chapter particularly helpful.

[2] *Compare* the provisions of La. Act 157 of 1940 *with* MISS. CODE §§ 6132-01—6132-44 (1942).

No doubt students of Louisiana mineral law will welcome the new edition. It might be offered as a suggestion to new students of the subject, who are prospective readers of the book, that they first read the discussion of the physical factors of oil and gas beginning on page 414, inasmuch as it is felt that some knowledge of conditions under which petroleum exists in the earth, is necessary for a complete understanding of both the so-called private and public-law aspects of oil and gas law.

*Ford W. Hall**

WHAT EVERY CORPORATION DIRECTOR SHOULD KNOW: By Percival E. Jackson. The William-Frederick Press, 1949, pp. 183. $3.50.

The author states that his purpose in writing this book is to set forth the guiding principles of corporate direction. His book satisfactorily accomplishes this purpose. It contains a mass of information essential to anyone serving as a corporation director, and it does so without being burdened by legal language. The experience of the author becomes more apparent as each page is turned.

Mr. Jackson is untiring in his efforts to illustrate the ideal in management selection and supervision, qualified directorates, and stockholder interest; he is unsparing in his criticism of the apathy of some stockholders, the inefficacy of "rubber-stamp boards," and the vacuum of management-dominated boards. His attempts to solve these problems in practice are as indefinite, however, as the attempt of most to follow the Golden Rule—concededly good in theory, but most elusive in attainment.

The book is of value to lawyers and non-lawyers alike, whose investments may enable them to serve as directors. To non-lawyers, it is of value in demonstrating, in simple language, the right and the wrong way of attacking the problems thus

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encountered. To lawyers, it permits a view of the problems and goals of directorates without reference to footnotes and citations, the trees are not obscured by the forest.

The chapters on "Composition of the Board" and "Organization of the Board and Procedure" are important, especially to the non-lawyer director. They illustrate the general functioning of corporations, and their relation to the business world. The constant theme contained in the chapters entitled "Powers and Functions" and "Disabilities and Liabilities" is that of the trust and confidence enjoyed by directors, with the resulting privileges, duties and liabilities. These points cannot be known too well nor reviewed too often. This book will serve to keep them at hand's grasp, in language that is as simple as the subject permits, fortified by numerous examples which remove abstractness.

The book will serve as a text for directors, and yet it is not to be so read. It may be more aptly described as a director's handbook, to be reviewed by him frequently so that the enduring principles inherent in the exercise of his privileges and duties may not be obscured by daily problems.

*Joe H. Daniel**

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*Member of the firm of Jackson, Young, Daniel and Mitchell; Jackson, Mississippi.

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